SUPREME COURT OF THE UNITED STATES.

No. 244.

THE SHIP B. L. HARRIMAN, C. J. JANSEN, CLAIMANT, APPELLANT,

vs.

JOSEPH EMERIC.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Libel	1	1
Exhibit "A," charter-party	7	3
Claim of Jansen	11	4
Answer	13	5
Decree of District Court	21	8
Notice of appeal by libellant	23	9
Appeal by claimant	27	9
Decree of Circuit Court	29	10
Appeal by claimant	31	11
Synopsis of evidence	33	11
Clerk's certificate	49	18

1 U. S. District Court, in admiralty.

Libel.

To the Honorable OGDEN HOFFMAN, judge of the District Court of the United States for the district of California:

Joseph Emeric, of the city of San Francisco, exhibits this his libel in a cause of action, civil and maritime, against the ship or vessel B. L. Harriman, now lying at the port of San Francisco, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, whereof C. G. Sivensen now is, or lately was, master, her boats, tackle, apparel, and furniture, and against C. J. Jansen, the owner of said ship or vessel, and against all persons lawfully intervening for their interest in said ship or vessel; and thereupon the said Joseph Emeric alleges as follows:

First. That on or about the seventh day of May, in the year one thousand eight hundred and sixty-six, the said ship or vessel
2 B. L. Harriman, whereof the said C. J. Sivensen was master, then being in the port of San Francisco, and designed on a voyage on the high seas, and within the ebb and flow of thereof, and within the admiralty and maritime jurisdiction of this court; and the said C. J. Jansen then being the owner of said ship or vessel, he, the said C. J. Jansen, on the one part, and the libellant on the other part, did mutually execute and deliver to each other a certain instrument in writing, usually known as a charter-party, and each of said parties did thereby bind himself to the performance and fulfilment of the promises and the stipulations contained in said instrument on his part, to be performed and fulfilled, of which said instrument, in writing, a copy is hereunto annexed and marked (A.)

Second. That, in pursuance of the provisions of said charter-party, the libellant, before the said ship or vessel sailed from the said port of San Francisco, named Valparaiso, in Chili, South America, as the port of discharge in and by certain instructions given in the manner
3 and form provided in said charter-party; and said ship or vessel, with a cargo of coal on board, provided and furnished by the libellant, being the same cargo described in said charter-party, sailed from the said port of San Francisco on or about the 22nd day of May, 1866, under the command of C. G. Sivensen, the master thereof, bound for the said port of Valparaiso, with liberty to call at the Chincha islands in case wind and weather and other circumstances should be favorable, without prejudice to any rights of the libellant under the said charter-party, or any instructions that had been given thereunder.

Third. That, on leaving the said port of San Francisco, the said ship or vessel, with said cargo on board, proceeded to the Chincha islands, where she arrived on the fourth day of August, 1866, and after remaining there a few hours, the said C. J. Sivenson, the master thereof, voluntarily put back said ship or vessel for the port of San Francisco, and failed to proceed, or to make any effort to proceed, to the said port of Valparaiso, though not prevented from

so doing by any peril of the sea. That said ship or vessel, during all the time aforesaid, was under command of the said C. G.
4 Sivensen, the master thereof.

Fifth. That on or about the sixth day of October, 1866, the said ship or vessel under the command of the said C. G. Sivensen, returned to and entered the said port of San Francisco with said cargo of coal still on board and undelivered, and without having proceeded to the said port of Valparaiso, or attempted to proceed thither.

Fifth. That the libellant has well and truly performed and kept all the covenants and stipulations on his part, in the said charter to be performed and kept; but neither the said C. J. Jansen, nor the said vessel, has well and truly kept the covenants and stipulations, on the part of said Jansen, and of said ship or vessel, respectively, to be performed and kept.

Sixth. That, on the return of said ship or vessel, as aforesaid, to the said port of San Francisco, with said cargo of coal on board and undischarged, and without having proceeded, or attempted to proceed, to the said port of Valparaiso, the said C. J. Jansen,
5 although said cargo had not been delivered, and although no cancelled bill of lading showing any delivery of said coal had been received by said Jansen, or by any person or persons demanded of this libellant, the balance of freight that would have been due under said charter-party if the said cargo of coal had been delivered pursuant to the terms of said charter-party, and a cancelled bill of lading showing such delivery had been received by said Jansen; and, in addition to making such demand, the said Jansen refused to permit said cargo of coal to be or remain on board said ship or vessel, and did also demand of the libellant that he, the said libellant, should discharge the said cargo of coal then in the said port of San Francisco, or pay the expense of such discharge.

That on about the 30th day of October, 1866, the said ship or vessel, by the direction of the said C. J. Jansen, commenced the discharge of her said cargo in the said port of San Francisco, and the libellant then and there demanded of said C. J. Jansen the delivery of said coal, but the said C. J. Jansen refused to deliver the same, alleging that the said cargo of coal had passed out of his hands, or that he had no longer control thereof.

6 Seventh. That by reason of the failure of said Jansen, as aforesaid, to fulfil the stipulations of said charter party on his part to be fulfilled, and by reason of the refusal of said Jansen to deliver said cargo to this libellant, and the conversion thereof by said Jansen to his own use, the libellant has sustained great loss and damage, for which he asks compensation in the sum of forty thousand dollars.

Eighth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this court.

Wherefore the libellant prays that process, in due form of law, may issue against the said ship, B. L. Harriman, her boats, tackle, apparel, and furniture, and against the said C. J. Jansen, and that

this honorable court will pronounce for the demand aforesaid, with costs, and for such other and further relief as may be proper.

WILLIAM BARBER,
Proctor for Libellant.

Sworn before me this day of Nov., 1866.

DAN'L T. SULLIVAN,
U. S. Com'r.

JOS. EMERIC.

7 *Exhibit A.—Libel.—Charter party.*

This charter-party, made and concluded upon in the city of San Francisco, the fourth day of May, in the year of our Lord one thousand eight hundred and sixty-six, between Charles J. Jansen, merchant of this city, owner of the British ship, B. L. Harriman, of the burthen of 576 tons, or thereabouts, register measurement, now lying in the harbour of San Francisco, of the first part, and Joseph Emeric, merchant of this city of San Francisco, of the second part, witnesseth: That the said party of the first part agrees, on the freighting and chartering of the whole of the said vessel (with the exception of the deck, cabin, and the necessary room for the crew and the stowage of provisions, sails and cables,) or sufficient room for the cargo hereinafter mentioned, unto the said party of the second part, for a voyage from San Francisco to Cobija, Bolivia, or other parts in the Pacific; the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, the commanding officer of the Spanish navy will have the right to re-
8 ceive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands, and in that case the vessel will immediately proceed to the port which will be named by said commanding officer, and there complete her discharge on the terms following: The said vessel will be tight, staunch, strong, and every way fitted for such voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned; and no goods or merchandise shall be laden on board otherwise than from the said party of the second part, or his agent.

The said party of the second part doth engage to provide and furnish to the said vessel a cargo of coal now on board of the said vessel, consisting of seven hundred and eighty-six (786) tons of 2,240 lbs. of New Castle, West Hartley steam coal. Should the vessel be detained at San Francisco, by any unforeseen occurrence, this charter-party to be null and void, and the coal to be discharged at ship's expense, at a convenient wharf in San Francisco, and to pay to said party of the first part, or his agent, for the use of said vessel during the voyage aforesaid, fifteen dollars per ton, of 2,240 lbs., in
9 United States gold coin; one-half to be paid here to C. J.

Jansen, of San Francisco, two days after the sailing of the vessel, less two and one-half per cent. discount for cash, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered; vessel to be dunnaged to the satisfaction of charterers, and to furnish to them a certificate Lloyds' surveyor, that he has surveyed the vessel, and that she is satisfactory to him as regards general condition, stowage, and draft of water; vessel to employ the stevedore usually employed by charterers, and to be stowed under the captain's supervision and direction; vessel to pay United States revenue stamps.

It is agreed that the lay days for the loading and discharging shall be as follows: to commence twenty-four hours after the captain reports himself ready to receive or discharge cargo. Twenty (20) running lay days to discharge at the port of discharge, or between the two ports of discharge, if the privilege within mentioned is used.

And that for each and every day's detention by default of said party of second part, or his agent, one hundred dollars ($100) per day, day by day, shall be paid by said party of the second part, or his agent, to said party of the first part, or his agent. Cargo to be received from alongside a wharf at San Francisco, and deliverable at ship's tackles at port or ports of discharge. Vessel to be free of commission at port or ports of discharge.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other, in the penal sum of amount of charter.

In witness whereof, we have hereunto set our hands the day and year first above written.

[L. S.] CHAS. J. JANSEN.
[L. S.] JOS. EMERIC.

Signed and sealed in the presence of—
JNO. MULE.

Endorsed: Filed Nov. 3, 1866. Geo. C. Gorham, clerk, by Dan'l T. Sullivan, deputy.

[$5 U. S. rev. stamp, cancelled.]

In the District Court of the United States of America northern district of California.

Claim.

JOSEPH EMERIC.
vs.
SHIP B. L. HARRIMAN, &c.

To the Hon. OGDEN HOFFMAN, judge of the District Court of the United States for the northern district of California.

C. J. Jansen, of the city of San Francisco, in said district, respectfully beg leave to represent:

That he is the owner of the ship B. L. Harriman, libelled herein

and now claims the same, and says that he will give bond to defend said action, and respond for costs.

And he prays your honor to appoint appraisers to appraise said ship, and that the same may be delivered to him immediately upon giving bond, with sureties approved of by your honor, and complying with all the requisitions of the laws in that behalf.

C. J. JANSEN.

12 By their proctor, G. F. & W. H. SHARP.

NORTHERN DISTRICT OF CALIFORNIA.

C. J. Jansen, above-named, being duly sworn, says that he has read the above claim, and knows the contents thereof, and that the facts therein stated are true of his own knowledge.

CHAS. J. JANSEN.

Subscribed and sworn to before me this 7th day of Novemb., 1866.

S. NEALL, *U. S. Com'r.*

Endorsed: Filed Nov. 7, 1866. Geo. C. Gorham, cl'k. By S. Neall, D. C.

13 In the District Court of the United States for the district of California.

Answer.

JOSEPH EMERIC
vs.
THE SHIP R. L. HARRIMAN AND CHARLES J. Jansen.

The answer of Charles J. Jansen, in his own behalf, and as owner and claimant of the ship "B. L. Harriman, to the libel of Joseph Emeric.

Now comes said Charles J. Jansen, a resident of the district, in his own behalf, and as owner of said ship "B. L. Harriman," and for answer to the libel of said Joseph Emeric, against him and said ship, doth allege and propound as follows:

First. That he is the true and bona fide owner of said ship, "B. L. Harriman," and that he made and executed the charter-party, a copy of which is attached to said libel and marked Exhibit A.

14 Second. That as to the matters stated in said second article of said libel, he says that the same are in a great part falsely and untruly alleged and pleaded, for the truth and fact was, and is, that on the 14th day of May, 1866, the port of Valparaiso, Chile, was named by said libellant as the port or place of discharge of the cargo of coal mentioned in said libel as provided for in said charter party, and that afterwards, on the 17th day of May, 1866, and before said ship left said port of San Francisco, said port or place of discharge, was changed by said libellant as in this article hereinafter stated.

That said libellant notified said captain of said ship "B. L. Harriman," on the day last aforesaid, that the base of operation of the Spanish fleet for which said cargo of coal was intended, was changed, and said libellant then and there instructed said captain of said ship as far as it lay in his power, to seek after said Spanish fleet between the port of Valparaiso, Chile, and the Chinchas Islands, in the South Pacific ocean, and there deliver said cargo of coal to the commanding officer of said fleet.

That said libellant represented to this respondent that said
15 fleet and officer would be at the last-named place ready and waiting to receive said cargo of coal. That said ship, "B. L. Harriman," sailed from said port of San Francisco under and in accordance with said last-named instructions and charter-party, and proceeded on her voyage to the place named in said instructions, and sought said fleet between said port of Valparaiso and Chinchas Islands, and was unable to meet with the same.

That said fleet had left said station over twelve weeks before said ship reached said place of discharge, and the destination of the same was concealed and unknown, and the captain of said ship could not learn the destination of the same, and said fleet never returned thereto, and the captain of said ship B. L. Harriman, could make no delivery of said cargo of coal under said charter-party and instructions.

That said delivery was rendered impossible by the departure of said fleet, with a destination concealed and unknown, and said captain was forced and compelled to bring said cargo of coal back to the same port of San Francisco.

16 Third. That as to the matters stated in said third article of said libel, he alleges and propounds as follows:

That he admits that said ship, "B. L. Harriman," arrived at the Chinchas Islands on the 4th day of August, 1866.

That the captain of said ship then and there landed for the sole purpose of learning the whereabouts, if possible, of said Spanish fleet, in order that he might seek the same and deliver said cargo of coal under said charter-party, and he then and there ascertained that said fleet had secretly left for parts unknown, and after ascertaining said fact by seeking said fleet between the port of Valparaiso and the Chinchas Islands aforesaid, to the extent that—

Fourth. That as to the matters stated in said fourth article of said libel, he alleges and propounds as follows:

That he admits that said ship returned to said port of San Francisco with said cargo of coal undelivered, but he denies that said ship was in duty bound to enter the said port of Valparaiso.

Fifth. That as to the matters stated in said fifth article of
17 said libel, he alleges and propounds as follows:

That it is not true that this respondent has not well and truly kept and performed all and every the covenants and stipulations of said charter-party, and instructions to be kept and performed by him and said said ship respectively.

Sixth. That as to the matters stated in said sixth article of said libel, he alleges and propounds as follows:

That the same are in a great part falsely and untruly alleged and pleaded, for the truth and fact was and is that the respondent offered to deliver said cargo of coal to said libellant, but he refused to receive or discharge the same.

That said libellant also refused to pay the freight due and payable on said cargo under said charter-party, and this respondent was always ready and willing to deliver, and did tender to said libellant a delivery of said cargo of coal upon the payment of said freight due thereon.

That this respondent claims and has a lien on said cargo of coal and the proceeds thereof, for the freight money due him as follows,
namely: five thousand eight hundred and eighth-three dollars
18 in gold coin of the United States, being the balance due on the down freight money under said charter-party, and the further sum of eleven thousand seven hundred and sixty-six dollars in gold coin of the United States for the return freight of said cargo, from the Chinchas Islands to the said port of San Francisco, and this respondent claims and holds possession of said cargo and the proceeds thereof for the payment of the same.

Seventh. That as to the matters stated in said seventh article of said libel he alleges and propounds as follows:

That said libellant has not been damaged in the sum of forty thousand dollars or in any other sum whatever, by reason of the failure of respondent or said ship to fulfil any stipulation of said charter-party, or by reason of the non-delivery of said cargo of coal, or by any act or deed of this respondent or said ship respectively, and he denies that he has converted the said cargo of coal or any part thereof to his own use.

Eighth. That this respondent fuather alleges and propounds as as follows:

19 That at the time of the making and delivery of the charter-party and the instructions provided for therein, war was then being waged between the republic of Chili and her Majesty Isabella, Queen of Spain, and that the said cargo of coal on board of said ship "B. L. Harriman," was intended for the use of, and going to, the fleet of her said Majesty the Queen of Spain, then blockading the port of Valparaiso and other ports of said republic of Chili, and said cargo was contraband of war and liable and subject in case of falling into the power of the authorities or forces of said republic of Chili, or if taken into Valparaiso or any other port of Chili, to seizure and forfeiture as a prize of war; it was fully understood between said libellant and respondent that said ship or cargo was not to enter or be taken in any port of Chili not in possession of said Spanish fleet, or to seek said fleet in waters not in the possession or under the control of said fleet. That said captain of said ship upon ascertaining that said Spanish fleet had permanently left the said station where he was required to seek the same without leaving any person or persons
20 to receive said cargo or any instructions or directions in relation thereto, and knowing that said cargo of coal was in danger of being seized and would actually be seized as a prize of war

in case the same was taken into Valparaiso or any other port of the said republic of Chili, or said Chinchas Islands, then and there determined, as agent of said owner of said cargo and to protect the interest of said owner, to bring said cargo back to the port of San Francisco.

That said captain had no other reasons than the interest of said owner and the absence of said fleet for bringing said cargo to said last named port, and the interests of said owner required and demanded that he should so act in the premises whereby said cargo was prevented from being seized and forfeited, and the same was preserved to and for said owner.

Wherefore said respondent asks that said libel be dismissed with his costs and for such other and further order as may be proper.

G. F. & W. H. SHARP,
And WILSON & CRITTENDEN,
Proctors for respondent.

Endorsed: Filed Decemb. 12, 1866. Geo. C. Gorham, clerk, by Dan'l T. Sullivan, deputy.

21 District Court of the United States district of California.

Decree.

JOSEPH EMERIC
vs.
THE SHIP B. L. HARRIMAN HER TACKLE, APPAREL, and furniture, and C. J. Jansen.

This case having been heard on the pleadings and proofs and having been argued by the advocates for the respective parties, and due deliberation having been had on the premises, it is now ordered, adjudged, and decreed that the libellant do recover of the defendant, Charles J. Jansen, and of the stipulators for costs and value, the sum of five thousand four hundred and sixty-six dollars with costs to be taxed, and that he have execution therefor against said defendant and said stipulators.

Dated San Francisco, May 14th 1867.

OGDEN HOFFMAN, *Dist. Judge.*

22
23 District Court of the United States for the district of California.

Notice of appeal.

JOSEPH EMERIC
vs.
THE SHIP B. L. HARRIMAN, C. J. Jansen, owner, &c.

SIR: The libellant intends to appeal from the final decree of the court in this cause.

Dated May 15, 1867.

WILLIAM BARBER,
Proctor for Libellant.
Messrs. GEO. F. & W. H. SHARP,
Proctors for Cl'ts.

To GEO. C. GORHAM, *Clerk, &c.*

Due service of the above notice is hereby admitted.

Dated May 15, 1867.

G. F. & W. H. SHARP, *for resp't.*

24 Endorsed: Filed May 14, 1867. Geo. C. Gorham, cl'k. By S. Neall, D. C.

25 U. S. District Court, district of California.

JOSEPH EMERIC
vs.
THE SHIP B. L. HARRIMAN.

I, Geo. C. Gorham, hereby certify that I am clerk of the above-entitled court, and that the appeal made from the final decree of this court by claimant, has been perfected.

Witness my hand and the seal of said court this 25th day of May, A. D. 1867.

GEO. C. GORHAM, *Clerk.*
By S. NEALL, *D. C.*

Endorsed: Filed 24 May, 1867. Geo. C. Gorham, clerk. By S. Neall, D. C.

26
27 To the Circuit Court of the United States for the district of California.

Appeal by claimant.

JOSEPH EMERIC
vs.
THE SHIP B. L. HARRIMAN, and C. J. Jansen, owner, &c.

The appeal of the above-named C. J. Jansen, owner of the ship "B. L. Harriman" respectfully shows that a decree was lately made in the District Court of the United States, bearing date the four-

teenth day of May, 1867, in a certain cause of admiralty and maritime jurisdiction in said court, wherein the above-named Joseph Emeric was libellant, and the abovenamed C. J. Jansen was respondent personally, and as claimant of said ship B. L. Harriman ordered, adjudged and decreed, that the said libellant should recover of said respondent the sum of $5,460 00 and costs, which said decree is, as this appellant is advised, erroneous, and ought to be reversed or so modified as to adjudge the respondent to recover from the libellant their claim for return freight which is a much larger sum than the amount allowed libellant.

That the respondent and claimant appeals from said decree
28 to the next Circuit Court to be held in said district, and on said appeal to have said cause heard anew on the pleadings and proofs in the District Court, and other proofs to be introduced in said Circuit Court. And the respondent and claimant herein prays that said decree be reversed, or such other decree made therein as to said circuit shall seem just with costs to the appellant.

San Francisco, May 21, 1867.

G. F. & W. F. SHARP,
S. M. WILSON,
Proctors for Respondent and Claimant.

Service of the foregoing appeal is hereby admitted.
San Francisco, May 24, 1867.

WM. BARBER, *Proctor for Resp't.*

Endorsed: Filed May 24, 1867. Geo. C. Gorham, clerk. By S. Neal, D. C.

29 Circuit Court of the United States ninth circuit.

Decree.

JOSEPH EMERICK, appellant,
vs.
THE SHIP "B. L. HARRIMAN," and Charles J. Jansen, claimant and respondent.

This cause having been brought to a hearing on the cross appeals taken therein from the decree of the District Court of the United States for the district of California, and having been argued by counsel for the appellant and respondent, and due deliberation having been had in the premises, it is hereby adjudged and decreed, that the decree of the said District Court be, and the same is hereby reserved, with costs, to the appellant; and it is further adjudged and decreed, that the said appellant do have and recover of the said Charles J. Jansen the sum of seventeen thousand three hundred and sixty-two 60-100 dollars, in gold coin of the United States, together with the costs of the appellant on said appeals, and that execution

issue against the said Charles J. Jansen therefor, and also
30 against the stipulators for costs and value.
Nov. 6, 1867.

FIELD, *J.*

Recorded at page 52 decree Register Admiralty, on the 6th November, 1867.

GEO. E. WHITNEY, *Clerk.*

Endorsed: Filed 6th Novemb. A. D. 1867. Geo. E. Whitney, clerk.

In the Circuit Court of the United States for the district of California.

JOSEPH EMERIC
v.
SHIP "B. L. HARRIMAN" *& al.*

UNITED STATES OF AMERICA,
District of California, ss:

I, George E. Whitney, clerk of the Circuit Court of the United Strtes for the district of California, do hereby certify that the foregoing papers hereto annexed, constitute the judgment record in the above entitled cause recorded in decree register admiralty No. 1, of said court at page 52.

Witness my hand and the seal of said court this 6th day of November, A. D. 1867.

Attest: GEO. E. WHITNEY, *Clerk.*

At a stated term of the Circuit Court of the United States for the district of California, held at San Francisco, on Wednesday the 6th of November, A. D. 1867.

Present, Hon. Stephen J. Field, Circuit Judge.

31 JOSEPH EMERIC
v.
SHIP "B. L. HARRIMAN" &c.

On motion of William H. Sharp, esq., proctor for claimant, ordered that the claimant be allowed an appeal from the final decree this day entered herein.

A true copy from the minutes.

GEO. WHITNEY, *Clerk.*

32

33 United States Circuit Court.

JOSEPH EMERIC
vs.
SHIP B. L. HARRIMAN AND Charles J. Jansen.

On the trial of this cause the libellant offered in evidence—

1. The charter-party, a copy of which is attached to the libel herein.

2. Letter of instruction of libellant, dated May 14, 1866, Exhibit A.

SAN FRANCISCO, *May* 14, '66.

Captain G. C. SWENSEN, of the Hawaian ship B. L. Harriman, present:

DEAR SIR: In accordance with the conditions of the charter party, entered into between Mr. Charles J. Jansen, owner of the ship "B. L. Harriman, (now under your command,) and myself, on the 7th instant, I hereby name you the port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San Francisco, and when there to report yourself to the commanding officer of the Spanish navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and if he desires to send
34 you to another port in Chili, Peru, or the Chinchas Islands, in which case you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter party.

I herewith hand you a letter for the commanding officer of the Spanish navy at Valparaiso, which contains the bill of lading of your entire cargo of coal, endorsed to his order, a duplicate of the charter party, and of this letter.

I remain, dear sir, yours truly,

JOS. EMERIC.

Mr. JOS. EMERIC, present:

I hereby acknowledge receipt of your above letter, dated May 14, 1866, and will follow its instructions.

Respectfully yours,

(Signed) G. C. SWENSEN.

3. Letter of instructions of libellant, dated May 17, 1866; Exhibit B.

SAN FRANCISCO, *May* 17, 1866.

Captain G. C. SWENSON, of the Hawaian ship B. L. Harriman, present:

35 DEAR SIR: Since addressing you the foregoing letter of the 14th instant, Ihave received from Panama, under date of April 23rd last, the following instructions and copy of which I herewith furnish you.

"On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operation until further order'd, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operation. In case however you should have taken up a vessel before the present reaches you, then you must instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas."

As far as it in your power, you are hereby requested by me to follow the above instructions.

Yours, etc.

JOS. EMERICK.

4. *Exhibit C.—Letter of instructions of libellant, dated May 19th, 1866.*

SAN FRANCISCO, *May* 19, 1866.

Captain G. C. SWENSON of Hawaian ship B. L. HARRIMAN.

36 DEAR SIR: In case the wind and weather or other circumstances favor your making the Chincha Islands, you are at liberty to call there, without however prejudicing my rights under the charter-party and instructions.

I remain, dear sir, yours,

JOS. EMERIC.

5. *Protest of Captain Swensen.—Ex. D.—Of which a copy was served on Emeric by Jansen, Oct'r 10, 1866.*

UNITED STATES OF AMERICA, *State of California,*
City and County of San Francisco ss:

To all people whom these presents shall or may concern, I, John W. McKenzie, a public notary, in and for the State and county aforesaid, by letters patent under the great seal of the said State, duly commissioned and sworn, residing in the city of San Francisco, send greeting:

37 Know ye, that on the eighth day of Ooctober, in the year of our Lord one thousand eight hundred and sixty-six, before me, the said notary, at my office in the city of San Francisco, personally appeared G. C. Swensen, master of the Hawaiian ship "B. L. Harriman," belonging to the Hawaiian kingdom, (the said master having previously noted in due form of law his intention to protest,) who being by me duly sworn on the Holy Evangelists of Almighty God, voluntarily and solemnly did declare and depose as follows, to wit: That he, the said appearer, on the twenty-second day of the month of May now last past, set sail and departed in and with his said vessel, from the port of San Francisco, having on board a cargo of coals, and bound first for the port of Valparaiso, Chili, via the Chincha Islands, the said vessel being under charter to Mr. Joseph Emerick, of San Francisco, and by said charterer directed thro' special letters of instructions to captain Swensen, under date of May the fourteenth, to report to the commanding officer of the Spanish fleet, off Valparaiso, having first touched at the Chincha Islands, the cargo of coal being consigned to the said commanding officer; the said vessel being then at her departure staunch, stout, and strong, her cargo well and sufficiently stowed and secured, well masted,
38 manned, tackled, victualled, apparelled, and appointed, and in every respect fit for sea and the voyage she was about to undertake; that on May, the twenty-second as aforesaid, sailed from

San Francisco, and from that day up to the first day of the month of August following, nothing in material occurred. On the second of August, the ship was in lat. 14° 33′ south; long. 76° 24′ west; on the third of August, made the land in the southward of the Chincha Islands, and the weather being then thick and hazy, lay off and on throughout the night. At 5 a. m. daylight, made sail, and stood in for the land; at about 10 a. m., the southernmost of the Chincha Islands bore north, and was distant about fifteen miles. On the fourth of August, at half past one, p. m., received a pilot on board; ran in close to the Island, hove the the ship's main topsail abach, and lay in close to the land. Captain Swensen now proceeded to the shore in his boat, and there ascertained from several American shipmasters that the Spanish fleet had hauled off from before Chilian ports, departed from the coast, and had taken a course for an unknown destination. Captain Swensen made diligent inquiry as to these facts, as was fully satisfied that the fleet had left as reported, and
39 that its destination was wholly unknown, and that any attempt to find the fleet would be entirely impracticable and fruitless.

At 5 p. m. of the same day day, Captain Swenson returned to his ship, and then determined that it would be absolutely necessary to return to San Franciso, and accordingly squared away, made sail, and steered to the northward and westward for the return trip.

Continued the homeward passage with variable winds, encountering some bad weather, and sustaining damage, and finally on the fifth day of the present month of October, the lights on the Fanallano islands were made, and on the following day the ship anchored in the harbour of San Francisco.

Now by reason of the withdrawl of the Spanish fleet, as aforesaid, and the absence of the commanding officer thereof, the consignee of the cargo of the "B. L. Harriman," the voyage of the said vessel has has been broken up, and a return to this port thereby rendered necessary; and such course and all losses, detriments, charges, and expenses that hath thereby been occasioned, are clearly and entirely attributable thereto, and cannot or ought not to be attributed to any insufficiency of the said vessel, the neglect or default of
40 him, this deponent, his officers, or crew.

He now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value as of right shall appertain.

And thereupon the said master protested and I, the said notary at his special instance and request, did, as by these presents I now do publicly and solemnly protest against the failure of charters, consignee, the commanding officer of the Spanish fleet, whose withdrawal and absence from the coast of Chili, and whose whereabouts rendered the delivery of cargo impossible, and caused the objects of the voyage to be broken up, and a return to San Francisco necessary, and thereby occasioned extraordinary expenses and losses to the said ship, for all which, and for all losses, costs, charges, expenses, damages, and injury which the said vessel, or the owner or owners

of the said vessel already have been, or may hereafter be called upon to pay, sustain, incur, or be put into by or on account of premises, so that no part of any losses, damages, injuries, or expenses already incurred, or hereafter to be incurred, do fall on him, the said master, his officers, or crew, but that the aforesaid Joseph
41 Emerick, charterer of the said ship B. L. Harriman, be held for the full amount of the same.

Thus done and protested in San Francisco, this eighth day of October, in the year of our Lord one thousand eight hundred and sixty-six.

In testimony whereof, as well as the said appearer, I, the notary, have subscribed these presents, and I have also caused my seal of office to be hereunto affixed the day and year before written.

(Signed) G. C. SWENSON.

(Signed) J. W. McKENZEE,
Notary Public.

STATE OF CALIFORNIA, *City and County of Francisco, ss*:

I, the undersigned notary public, hereby certify the foregoing act of protest to be an accurate and faithful copy of the original on record in my book of official acts.

In testimonium veritatis.

J. W. McKENZIE, *Notary Public.*

Endorsed: Filed March 18, 1867. G. C. Gorham, clerk, by S. Neal, D. C.

42 6. Letter of Janson to Emeric, dated June 16, 1866.

Exhibit E.

[Copy.]

JOSEPH EMERIC, Esq., *San Francisco*:

DEAR SIR: In your charter of the ship B. L. Harriman, there is no provision made for the possibility of there being no body to receive her (the ship's cargo) on arrival, nor do I know that the captain of the "Harriman" had your private instructions on this point. At the time of making the charter we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson.

San Francisco, June 16, 1866.

Yours, very respect'y,

CHAS. J. JANSON.

7. Letter of Janson to Emeric, dated Oct'r 21, 1866.

Exh. F.

JOSEPH EMERIC, Esq.:

DEAR SIR: Immediately after the arrival of the ship B. L.
43 Harriman in this port, on or about the 6th instant, notified you of the same, and requested you to enter the cargo consisting of seven hundred and eighty-four 8-20 (784 8-20) tons coal at the custom-house, and to take said coal from the vessel, as she then stood greatly in deed of repairs. Fifteen days have now elapsed and nothing have [have] been done by you towards entering or taking said cargo. The ship is in such condition that it is absolutely necessary that the cargo should be taken from her without further delay. If I do not hear from you by to-morrow, I shall consign said cargo to some commission merchant of this city, and have the same entered at the custom-house and discharged forthwith.

This course will incur an expense which may in part be avoided if you will designate the place where you desire said cargo stored. I shall also if possible obtain from said consignee the balance of the freight due me upon said cargo, and have said consignee advance the necessary charges and expenses for unloading the same. All of which will be a lien upon said coal.

Yours very respect'ly

CHAS. J. JANSEN.

San Francisco, Octr. 22, 1866.

44 Reply thereto of Emeric, dated Octr. 23, 1860.

Exh. H.

SAN FRANCISCO, *Octr.* 23, 1866.

CHARLES JANSEN, Esq., present.

DEAR SIR: Your note of yesterday is received; shortly after the arrival of the "B. L. Harriman" at this port you notified me to pay the balance of freight claimed by you under the charter-party and to discharge the cargo. I declined to do so, because, so far from admitting any freight to be due, I claim to receive back that which has already been paid, together with damages, for breach of the charter-party.

As the charter-party did not provide for or contemplate the return of the cargo to this port, I regard your proposal to discharge here as a confession of your inability to fulfil the terms of the charter-party.

The ship is entirely under your control, and I must therefore decline to make any suggestions in reference to her discharge, leaving you to act under your legal responsibility as you may be advised.

If in consequence of your failure to deliver the cargo at the destination agreed, on you now propose to return it to me as the
45 owner, I am ready to receive it provided it be placed in my possession free from any costs or charges; but it must be distinctly understood that I do not accept such delivery as a substi-

tuted delivery, but as a matter of necessity arising from your confessed inability to fulfil the stipulations of the charter-party, and that I do not by accepting such delivery waive any existing rights.

I remain, dear sir, yours, very resp'y,

JOS. EMERIC.

9. Letter of Emeric to Jansen, dated Oct'r 27, 1866.

Ex. I.

SAN FRANCISCO, *Oct'r* 27, 1866.

CHARLES J. JANSEN, present.

DEAR SIR: In your note of October 22, you informed me of the course you proposed to take in reference to the cargo of the "B. L. Harriman," unless you heard from me on the following day.

I answered your note on the following day, but I have not heard whether my reply produced any change in the course you proposed to take.

46 You will therefore oblige me by stating what your present intention is in reference to this cargo, and if you propose to discharge, you will please notify me of the time and place of such discharge.

Yours very respect'y,

JOS. EMERIC.

The libellant then proved the coal was worth $15 gold coin per ton, duty paid.

That libellant demanded coal on Octr. 31, 1866, and delivery refused unless payment of freight.

The libellant then rested his case and respondent then proved,

1. That at the sale of charter-party war was existing between Spain and Chile.

2. That cargo was intended for the admiral of the Spanish fleet, then supposed to be operating against Valparaiso.

3. That on May 24, 1866, the fleet left the coast of Chile and went to parts unknown and did not return there.

4. The captain (Swensen) of the B. L. Harriman testified that he eft the port of San Francisco, May 22, 1866; that he was informed on arrival at Chinchas Islands of the bombardment of Callao, on May 2, 1866, by the Spanish fleet; that the fleet had been badly shattered and had sailed away.

47 Capt. Swensen arrived at Chinchas Aug. 3rd, 1866. A regular mail steamer from Valparaiso reported that all was quiet at Valparaiso; that nothing was known of the fleet. Captain Swensen feared that coal would have been seized if he had betrayed the objects of the voyage; the feeling was very bitter. He believed the coal would have been instantly seized at Valparaiso.

5th. The claimant then proved by C. L. Taylor the correctness of each and every item stated in the account of sale of coal by him, dated Nov. 13, 1866, contained in Ex. K, but added that 83 70-100 of the duties there charged was afterwards refunded.

Ship "B. L. Harriman" and owners in ac. with C. L. Taylor & Co.

1866. CR.

Nov. 13. Sold cargo West Hartley coal, 718 1/2 4 3 9/40 tons, at $15, cash $10,779 63

1866. DR.

Oct'r 26.	Paid duty at custom-house	$980 70	
Nov. 5.	Discharging 718½ tons, at 40c.....	287 40	
5.	Custom-house charges, entering	6 50	
48 Nov. 9.	Hauling, piling, weighing, and one mo. storage, 718½ tons, at 82½c...	592 75	
14.	5 p. c. com. on sale, $10,779 63	538 98	
Nov. 14.	1 p. c. com. on am't advanced, $1,867	18 65	
			2,424 98
14.	Balance to credit of the ship.....		8,354 65
			$10,779 63

E. & O. E.
San Francisco, Nov. 14, 1866.
(Signed) C. L. TAYLOR & CO.

He called on Emeric before suit, and offered to deliver cargo upon payment of freight. Demanded freight on charter-party.

The foregoing was all the evidence in the cause.

San Francisco, Novemb. 8, 1867.

FIELD, J.

Endorsed: Filed 8 Nov., 1867. Geo. E. Whitney, clerk.

49 THE SHIP "B. L. HARRIMAN" }
vs.
JOSEPH EMERIC. }

DISTRICT OF CALIFORNIA, *ss*:

I, George E. Whitney, clerk of the Circuit Court of the United States for the district of California, do hereby certify that the foregoing forty-eight pages, numbered from 1 to 48, both inclusive, constitute a full and true transcript of the record and proceedings on appeal in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, as San Francisco, this 18th day of December, A. D. 1867.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

Ship "B. L. Harriman" and owners in ac. with C. L. Taylor & Co.

1866.		Cr.	
Nov. 13.	Sold cargo West Hartley coal, 718 $\frac{1}{2}\frac{4}{2}\frac{3}{4}\frac{9}{0}$ tons, at $15, cash		$10,779 63

1866.		Dr.		
Oct'r 26.	Paid duty at custom-house	$980 70		
Nov. 5.	Discharging 718½ tons, at 40c	287 40		
5.	Custom-house charges, entering	6 50		
48 Nov. 9.	Hauling, piling, weighing, and one mo. storage, 718½ tons, at 82½c	592 75		
14.	5 p. c. com. on sale, $10,779 63	538 98		
Nov. 14.	1 p. c. com. on am't advanced, $1,867	18 65		
			2,424 98	
14.	Balance to credit of the ship		8,354 65	
			$10,779 63	

E. & O. E.
San Francisco, Nov. 14, 1866.
(Signed) C. L. TAYLOR & CO.

He called on Emeric before suit, and offered to deliver cargo upon payment of freight. Demanded freight on charter-party.

The foregoing was all the evidence in the cause.

San Francisco, Novemb. 8, 1867.

FIELD, J.

Endorsed: Filed 8 Nov., 1867. Geo. E. Whitney, clerk.

49 THE SHIP "B. L. HARRIMAN"
vs.
JOSEPH EMERIC.

DISTRICT OF CALIFORNIA, *ss*:

I, George E. Whitney, clerk of the Circuit Court of the United States for the district of California, do hereby certify that the foregoing forty-eight pages, numbered from 1 to 48, both inclusive, constitute a full and true transcript of the record and proceedings on appeal in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, as San Francisco, this 18th day of December, A. D. 1867.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

Ship "B. L. Harriman" and owners in ac. with C. L. Taylor & Co.

1866.		Cr.	
Nov. 13.	Sold cargo West Hartley coal, 718 $\frac{143}{240}$ tons, at $15, cash		$10,779 63

1866.		Dr.		
Oct'r 26.	Paid duty at custom-house	$980 70		
Nov. 5.	Discharging 718½ tons, at 40c	287 40		
5.	Custom-house charges, entering	6 50		
48 Nov. 9.	Hauling, piling, weighing, and one mo. storage, 718½ tons, at 82½c	592 75		
14.	5 p. c. com. on sale, $10,779 63	538 98		
Nov. 14.	1 p. c. com. on am't advanced, $1,867	18 65		
			2,424 98	
14.	Balance to credit of the ship		8,354 65	
			$10,779 63	

E. & O. E.
San Francisco, Nov. 14, 1866.
(Signed) C. L. TAYLOR & CO.

He called on Emeric before suit, and offered to deliver cargo upon payment of freight. Demanded freight on charter-party.

The foregoing was all the evidence in the cause.

San Francisco, Novemb. 8, 1867.

FIELD, J.

Endorsed: Filed 8 Nov., 1867. Geo. E. Whitney, clerk.

49 THE SHIP "B. L. HARRIMAN"
vs.
JOSEPH EMERIC.

DISTRICT OF CALIFORNIA, *ss*:

I, George E. Whitney, clerk of the Circuit Court of the United States for the district of California, do hereby certify that the foregoing forty-eight pages, numbered from 1 to 48, both inclusive, constitute a full and true transcript of the record and proceedings on appeal in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, as San Francisco, this 18th day of December, A. D. 1867.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

Evening Post Steam Presses, 41 Nassau St. N. Y.

Supreme Court

OF THE UNITED STATES.

The Ship "B. L. Harriman," C. J. Jansen, Claimant, Appellant, *vs.* Joseph Emerio, Respondent.	No. 65.

Statement.

During the recent war between Spain and the Republics of Chili and Peru, the Spanish fleet being engaged in active hostilities in the South American waters against the ports of the enemy, required supplies of steam coal, and vessels were taken up, on charter, in San Francisco, to convey cargoes, on consignment to the naval commanders, for delivery at sea to the vessels of the fleet in aid of the hostile operations of blockade and bombardment of the Chilian ports.

Among these vessels taken up by the agents of the Spanish fleet, was the ship *B. L. Harriman*, which was engaged in this service by a charter party, under date of May 4, 1866, entered into between Charles J. Jansen, her owner, a merchant of San Francisco, and Joseph Emeric, as freighter, also a merchant of that city.

The ship engaged her whole capacity to the freighter, and to take no cargo except from him or his agent, he stipulating to furnish a cargo of 786 tons of steam coal (already laden on board), and to pay "for the use of said vessel during the voyage aforesaid, $15 per ton in United States gold coin, one half to be paid here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, less two and one-half per cent. discount for cash, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered."

The owner stipulated for the freighting and chartering of the vessel, "for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific; the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given, to Valparaiso, *the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole, or none, and to send her, if he desires, to another port in Chili, Peru or the Chincha Islands*, and in that case, the vessel will immediately proceed to the *port which will be named by said commanding officer*, and there complete her discharge."

Rec., p. 3–4.

The letter of instructions, provided for in the Charter party was given by the freighter to the master of the ship, under date of May 14, 1866, and says, "I hereby name you the port of Valparaiso, Chili, as the first port you have to proceed to on leaving San Francisco, and when there, *to report yourself to the Commanding officer*

of the Spanish navy, who will have the right, &c.", (pursuing the privilege contained in the Charter party.)

The instructions proceed, "I herewith hand you a letter for *the Commanding Officer of the Spanish navy*, at Valparaiso, *which contains the bill of lading of your entire cargo of coal, endorsed to his order, a duplicate of this Charter party and of this letter.*"

Rec., p. 12.

Before the ship sailed, the freighter addressed another letter of instructions to the master, as follows:

San Francisco, May 17th, 1866.

Dear Sir,—Since addressing you the foregoing letter of the 14th instant, I have received from Panama, under date of April 23rd last, the following instructions and copy of which I herewith furnish you.

" On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operation. In case, however, you should have taken up avessel before the present reaches you, then you must instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas."

As far as it is in your power, you are hereby requested by me to follow above instructions.

Yours, &c.,

Jos. Emeric.

Rec., p. 12—13.

On the 19th May, the freighter gave to the master the liberty to call at the Chincha Islands, if wind and weather or other circumstances favored his making them without prejudicing the freighter's rights under the Charter party and instructions.

Rec., p. 13.

After the ship sailed, the owner wrote a letter to the freighter, as follows:

Dear Sir,—In your Charter of the ship B. L. Harriman there is no provision made for the possibility of there being no body to receive her (the ship's cargo) on arrival, nor do I know that the Captain of the "*Harriman*" had your private instructions on this point. At the time of making the charter we could hardly contemplete anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson.

San Francisco, June 16, 1866.

Yours very respectfully,
CHAS. J. JANSEN.

Rec., p. 15.

It appeared in proof that, during the period of this transaction, war existed between Spain and Chili; that the cargo was intended for the Admiral of the Spanish fleet, then supposed to be operating against Valparaiso; that the ship sailed from San Francisco, May 22nd, and that, in fact, *on May 24th, the fleet left the coast of Chili, and went to parts unknown, and did not return there.*

It further appeared, that the ship arrived at the Chinchas, Aug. 3d, 1866, and was there informed of the bombardment of Callao by the Spanish fleet, May 2d, that the fleet had been badly shattered, and had sailed away; that a regular mail steamer from Valparaiso also reported, at the Chinchas, that all was quiet at Valparaiso, and that nothing was known of the fleet.

The master also proved that the coal would have been seized at the Chinchas if he had betrayed the objects of the voyage, as the feeling was very bitter, and that he believed the coal would have been instantly seized at Valparaiso.

Rec., p. 17.

The ship returned to San Francisco, the owner offered to deliver the cargo there to the freighter, on payment of freight according to the charter party. Payment of freight was refused by the freighter, and the cargo was demanded by him, which was refused except on payment of freight.

Rec., p. 16–18.

The owner sold the cargo, and the freighter libelled the ship for the value of the cargo, and to recover back the amount paid under the charter party at the outset of the voyage, as so much freight paid in advance.

The owner justified the sale under his lien for freight, claiming the unpaid charter money, and a return freight at the same rate, for the home voyage.

The District Court, Judge Hoffman, sustained the owner's right and lien for the unpaid charter money, but rejected the claim for freight on the return voyage, and as the result, gave a decree against the vessel for the balance of the proceeds in the owner's hands from the sale of the cargo, after satisfying the lien as allowed.

Rec., p. 8.
Opinion of Judge Hoffman.
Respondent's Brief, p. 27.

Both parties appealed to the Circuit Court, and that Court, Mr. Justice Field, rejected the right and lien of the owner to the charter freight, and gave a decree for the proceeds of the cargo sold, and the charter money paid at the outset of the voyage.

Rec., p. 10.
Opinion of Mr. Justice Field.
Respondent's Brief, p. 18.

The claimant appeals to the Supreme Court.

Points.

First Point.—The controversy as to the legal right of the owner and the freighter, under the charter party entered into between them, and in the actual outturn of the voyage, arises upon a state of *facts* quite free from either obscurity or dispute.

I. The real freighter, acting through the agency of the libellant, a San Francisco merchant, was the Admiral of the Spanish fleet, and to him the cargo was consigned, the bill of lading endorsed, and to him the ship was required to report, and his instructions the master was required to obey.

II. The whole object of the voyage, and the whole motive of the affreightment, were the supply of coal to the Spanish fleet, for use therein, in aid and support of its hostile operations against the Chilian sea-ports.

III. This service of the ship, not only made the *cargo*, by its destination, contraband of war and lawful prize to the Spaniard's enemy, but exposed the *ship itself*, thus made a guilty tender of the Spanish maritime hostilities, to lawful capture and condemnation.

IV. These considerations determine the *destination* of the voyage as *the Spanish fleet off the coast of Chili*, and limit the purpose and the significance of any reference to Valparaiso, the Chinchas, or the other geographical or commercial points, to an ascertainment of the *situs* of the fleet, within the reciprocal engagements of the charter party.

V. The ports or commerce of the Spaniard's enemy were not only wholly foreign to the purpose and

the terms of the projected voyage, but the nature of the enterprise, and the interests of owner and freighter alike, excluded such ports and commerce as an alternative resort, or even a possible refuge, unless from otherwise inevitable shipwreck.

VI. By the very necessity of the reciprocal engagements, therefore, upon which the project of the voyage rested, the *situs* of the Spanish fleet, as the terminus of the voyage, and the presence of the consignee, the Admiral, to receive the deposite of the cargo and liberate the ship from its transported burden, was within the obligations of the *freighter*, and clear of any responsibility or venture of the *owner*.

VII. The charter party, the contemporaneous instructions and the last advices from the Spanish fleet, communicated to the master by the freighter, admit of but one interpretation.

The Spanish fleet was to receive the cargo at Valparaiso, and the Admiral, within certain limits, was to direct its deposit or distribution.

By the advices, communicated by the letter of the freighter to the master, under date of May 17th, an *indulgence* rather than a right, was suggested, that, contingently, the presence of the Spanish fleet between Valparaiso and the Chincha Islands should be a sufficient compliance with its obligations in respect of the *geographical* terminus of the voyage.

VIII. The ship sailed upon and completed the voyage, bringing itself within the waters contemplated as the *situs* of the Spanish fleet for the reception of the cargo. She held the cargo merely for delivery, and nothing but the absence of the stipulated depositary and consignee prevented the delivery.

IX. Within two days after the ship sailed from San

Francisco (May 24th), the Spanish fleet voluntarily withdrew from the South American waters, and never returned. Thus, by this voluntary act of the freighter's principal, and stipulated consignee, the delivery of the cargo was prevented, its deposite rendered impossible, and the ship's master made the freighter's agent, by necessity, for the preservation of the cargo.

X. The master of the ship, observing all the obligations of his new and compulsory duty, by prudent counsels and prompt action, extricated the cargo from the destruction to which the consignee had abandoned it, and the ship itself from the peril to which the consignee's desertion of his obligations had exposed it.

XI. It is under this state of facts that the legal questions are presented, for the adjudication of this Appellate Tribunal, in conclusion of the doubts raised by the differing decrees of the eminent and able Judges of the Courts below.

Second Point.—The propositions of the libellant are, that the actual contract between the freighter and the owner falls within the ordinary contract of affreightment, *whereby a delivery of cargo at the port of destined discharge* is a necessary part of performance of *his* contract by the owner in earning charter money or freight.

That in the actual circumstances of this voyage, however excusable the non-depositing of the cargo for confiscation, may have been, there has been no acceptance on the part of the freighter, of short performance by the owner, and, so, there is no obligation to pay freight.

That the payment by the freighter under the charter

party, at the outset of the voyage, was not a definitive payment, but an advance of freight to be earned, and in the owner's failure to earn freight, is recoverable back.

These propositions are sustained in the decree and opinion of the Circuit Court.

Third Point.—The propositions of the claimant and appellant are,

(1.) That by the terms of *this* contract of affreightment the Spanish fleet was the destined *terminus* of the voyage for the deposite of cargo, with a stipulated *situs* of that fleet, for the purposes of performance of the contract on one side and the other.

That by action and upon motives, with and for which the owner had no share or responsibility, the fleet was withdrawn, as a terminus of the voyage, and the *situs* for performance, in actual delivery and receipt of cargo, voluntarily abandoned.

That, therefore, the performance of the voyage, and readiness to deliver the cargo completes the earning of freight, and the continued possession of the cargo by the owner was by involuntary agency for the freighter and in maintenance of the owner's lien for freight.

These propositions are sustained in the decree and opinion of the District Court.

Fourth Point.—It is confidently submitted that the determinate features of this contract, and the actual circumstances of this voyage, entitled the owner to

the stipulated freight of the charter party, and that the decree of the District Court, so adjudging, was right.

I. The general and substantial rule for the administration of justice between parties, upon their contracts, is, that their intention, being lawful, is to be ascertained and respected, and judically enforced, either by execution of the contract, or by indemnity for its violation.

The *interpretation* of any contract, brought into judicial question, involves a consideration of its express stipulations, and of what is to be supplied, by usage or law, when the expression is incomplete or indeterminate.

II. The general rule for fixing the rights of owner and freighter, under the common contract of af freightment, is, that the frustration of the voyage, whereby the cargo fails to be transported or delivered, defeats the recovery of freight, whenever,

(1.) The failure arises from the *fault* of the ship, her owner, or master, in which case the freighter would also have damages for non-fulfilment of the contract. Or,

(2.) When the failure arises from such inevitable accident or necessity, *without fault*, as the law casts the burden and consequence of upon the *owner*.

And the rules of law have been determined,

(*a*) That the voyage failing from the perilsof the sea, being without fault, falls upon the owner *even when the operation of these perils is expended upon the cargo alone from its perishable nature*, and the ship would be able to transport the cargo and deliver it, were it capable of transportation.

This is the doctrine of Miston *v.* Lord, 1 Blutch., C. C. Rep., p. 357.

(*b.*) That the voyage failing, from political restraints, as of *embargo* preventing departure, or *blockade*, preventing delivery, falls upon the owner and defeats the earning of the freight.

This is the doctrine of Scott, *vs.* Libby, 2 John, Rep. 340, in case of *blockade*, and of Atkinson *vs.* Ritchie, 10 East 530, in case of *embargo*, and of numerous cases cited on respondent's brief.

III. But the law gives to the *owner* a recovery of freight, when the failure of transportation or delivery arises from the fault of the *freighter*, or from such inevitable accident or necessity as the law casts the burden and consequence of upon the freighter.

Clendaniel *v.* Tuckerman, 17 Barb. 184.
Morgan *v.* Ins. Co. N. A. 4 Dall, 455.
Boulay Paty and Valin as cited in Judge Hoffman's opinion.
Hills *v.* Sughrue, 15 M. and W., 253.
Barker *v.* Hodgson, 3 M. and S. 267.
Sonton's case, T. Mars., 15, 1, 248, (cited 1 Pritch., Adm., p. 271, § 116.)

IV.—The rule of law, which saves either party from the burden or ill consequences of the *fault* or *short-comings* of the opposite party, needs neither illustration nor vindication.

V.—The rule of law which throws the burden or ill consequences of inevitable accident or necessity, which frustrates the contemplated execution of the contract, upon one party or the other, as the case

may be, is pointed out in this proposition in ALLEYN.

> " When a party, by his own contract, *creates a duty or charge upon himself*, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract.*
>
> Paradine *vs.* Jane, Alleyn Rep., 27.

Fifth Point.—It is impossible, under the above propositions and authorities, to assign the absence of the Spanish fleet from the stipulated *situs* for the deposite and discharge of the cargo, to the fault or responsibility of the owner.

The perils of the seas, which the owner bears the misfortune of, *are those that attend the navigation of his own vessel on its voyage*, and no others.

The retention in port, or the exclusion from port, which deprives the owner of the earning of freight, *arrests his vessel*, and thus, by strong hand, *prevents* his earning freight.

The frustration of *this* voyage rests wholly upon the voluntary action of the real freighter and consignee.

Sixth Point.—The proof discloses no state of facts which makes the withdrawal of the Spanish fleet from the stipulated *situs* for the deposit of this cargo, before the performance of the voyage of the charter party, otherwise than *voluntary.*

Doubtless there were the best of arguments, which made it wiser and more gainful for the Spanish fleet to seek other seas, instead of waiting to pick up this cargo of coal, according to the engagements of this charter-party.

But, still, this balancing of interests, by the Spaniard, was *voluntary*, and was not at the expense of this owner's interests, which, neither by contract nor by necessity, had been submitted to the Spanish Admiral's discretion.

Upon the plainest principles, therefore, the defeat of the delivery of the cargo to the consignee, the sole frustration of the voyage, was the wilful act of the freighter.

Seventh Point.—But, if, from the perils of the sea or other overwhelming disaster, the Spanish fleet had been unable to keep the engagement of the charter party, that would have been a situation of which the risk and the misfortune must rest upon the freighter.

The freighter "*might have provided against it by his contract*," but not having done so, and having "*by his own contract created a duty or charge upon himself, he is bound to make it good.*"

Paradine *vs.* Jane, *ut supra.*

In truth, it is only by the confusion, attempted to be made, between the engagements of this charter party as bearing upon the Spanish freighter and upon Emeric, the San Francisco agent, that any support has been gained for the theory which puts upon this ship the risks of the Spanish war.

The owner, as soon as any doubt had arisen at San Francisco as to the possibility of unloading the cargo, under the charter party, endeavored to lighten the freighter's obligations, in respect of return freight, by applying for the wishes of the freighter on such a contingency.

Letter June 16, Rec., p. 15.

Eighth Point.—The claimant was also entitled to retain the proceeds of the cargo in his hands, for the return freight which he had earned in the service of the freighter, upon the duty cast upon the ship by the fault of the freighter.

Whether this should have been at the rate of the contract, or at the *quantum meruit*, is immaterial, as either would have exhausted the remnant of the proceeds of cargo.

Ninth Point.—The decree of the Circuit Court in adjudging that the stipulated payment required by the charter party, at the outset of the voyage, should be refunded, was, certainly, erroneous.

I. Because the whole freight was earned as has been insisted above.

II. Because the terms of this charter party and the nature of the engagement make the payment *definitive, and earned by the sailing of the vessel*, and not an advance or credit upon the future earning of freight.

Blakely *vs.* Dixon, 2 B. & P., 321.
De Silvale *vs.* Kendall, 4 M. & S., 37.
Saunders *vs.* Drew, 3 Barn. & Ad., 445.
Mansfield vs. Maitland., 4, Id. 552.
The John, 3 W. Rob. 177.

The American doctrine, as adjudicated in *Phelps* vs. *Williamson* (5 Sand., S C. R.) is not inconsistent with those authorities or this proposition.

Last Point.—The decree of the Circuit Court should be reversed, and the decree of the District Court either affirmed or modified, according as the judgment of this Court shall be on the question of *the earning of freight on the return voyage*, as presented in the EIGHTH POINT, *supra*.

WM. M. EVARTS,
Of Counsel for Claimant and Appellant.

Supreme Court of the United States.

THE SHIP "B. L. HARRIMAN," C. J. JANSEN,
CLAIMANT AND APPELLANT,

vs.

JOSEPH EMERIC,
APPELLEE.

BRIEF FOR APPELLEE.

BOSTON:
ALFRED MUDGE & SON, PRINTERS, 34 SCHOOL STREET.
1869.

Supreme Court of the United States.

THE SHIP "B. L. HARRIMAN," C. J. JANSEN, CLAIMANT AND APPELLANT,

vs.

JOSEPH EMERIC, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

On the 7th May, 1866, Joseph Emeric and Charles J. Jansen executed and entered into the charter party, of which a copy is hereto annexed, marked Exhibit A.

On the 14th May, 1866, Emeric sent Captain Swensen the letter marked Exhibit B.

On the 17th May, 1866, Emeric sent Captain Swensen the letter marked Exhibit C.

On the 19th May, 1866, Emeric sent Captain Swensen the letter marked Exhibit D.

The vessel left the port of San Francisco May 22d; on the 16th June, Jansen sent Emeric the letter, marked Exhibit E. On the 3d August, the "B. L. Harriman" reached the Chinchas, by a course which carried her several degrees west and south of those islands. Capt. Swensen there learned of the repulse of the Spanish fleet from before Callao, and of its subsequent departure for an unknown destination, and received reliable intelligence that all was quiet at Valparaiso. After remaining about an hour at the Chinchas, Capt. Swensen left and at once ordered the vessel

back to San Francisco, where she arrived October 6th. On the 8th he made a formal protest (see Record, p. 13), and served a copy on Emeric. Jansen at once demanded freight, or rather balance of freight (one-half having, as per charter party, been paid in advance), and expenses of discharge, etc. To this demand Emeric refused to accede, whereupon Jansen sold the cargo of coal. Emeric then libelled the vessel for breach of charter party. The District Court decided that full freight had been earned, charged Emeric with all the expenses of the sale, including commissions on the whole amount of the account of sales, $10,779.63, and awarded the residue, estimated at $5,460, to Emeric.

On the above statement of facts, the following questions are presented:

1st. What was the contract between Jansen, the owner, and Emeric, the charterer, under which the "B. L. Harriman" left the port of San Francisco?

2d. Has that contract been fulfilled?

3d. If not fulfilled, was fulfilment waived by the charterer, or prevented by his fault or omission?

4th. If the contract has not been fulfilled, and if fulfilment has neither been waived nor prevented by the charterer, can the owner recover the amount of freight stipulated as compensation for the performance of the contract?

POINT I.

1. Looking at the charter party, completed as it was by the instructions of May 14th (Exhibit B), designating Valparaiso as the first port of destination, the contract was clear and explicit to proceed to that port. If, as was anticipated, but not covenanted or warranted by the charterer, the Admiral of the Spanish fleet should be found at Valparaiso on the arrival there of the B. L. Harriman, or during the stipulated lay-days, after

arrival, the master, Capt. Swensen, was to tender him the cargo, which he might receive in whole, or receive only in part, or decline to receive; and, in either of the two latter contingencies he was empowered to send the vessel to a final port of discharge in Chili, Peru, or the Chinchas.

2. Such being the contract, was it subsequently varied so as to release the vessel from the obligation of proceeding to Valparaiso? The only pretence for asserting that any such change in the contract was made is found in the letter of May 17th (Exhibit C), containing an extract from a letter of the charterer's correspondent in Panama, suggesting that it was probable that the Spanish fleet might have changed its base of operations, and that if any vessels chartered by him with supplies for the Spanish fleet had not already sailed from San Francisco, they should be directed to seek for the Spanish fleet between the Chinchas and Valparaiso. Mr. Emeric, the charterer, requested Capt. Swensen to comply with these instructions, "so far (he is careful to add) as it is in your power."

3. Mr. Emeric's correspondent, on whose behalf he seems to have been acting as a factor, does not direct him to cancel any charters made for Valparaiso, or to substitute any other port of destination. In the uncertainty which prevailed as to the movements of the Spanish fleet, such a step might have been injudicious. At all events, no such change was made.

4. The inference which Capt. Swensen was bound to draw from the letter of May 17, was, that Emeric, in chartering the vessel, was acting under the instructions of the same party who made the suggestions contained in that letter, with which Capt. Swensen was requested to comply so far as was in his power. If that party, in giving those instructions, did not suggest the substitution in the charter party of any other port for Valparaiso, — if Emeric did not make or propose any such substitution, but only directed that his correspondent's suggestions should be complied

with, so far as lay in the power of the master, — what right had the master, or his principal, Jansen, to suppose that the original contract was superseded, and a new one substituted in its place, by which the ship's duty was *limited solely to seeking after the fleet between Valparaiso and the Chinchas?*

5. But the master did not suppose that the "B. L. Harriman" left port under any such contract, nor did Jansen suppose so, nor did Emeric suppose so.

6. *First. As to the master.* In his protest, made October 8, 1866, two days after his return to San Francisco, he distinctly describes the voyage as from San Francisco to Valparaiso, via the Chinchas (Record p. 13), and he says that voyage "was broken up." (Record p. 14.) He does not pretend that the ship performed her contract, or that the stipulated voyage was completed; but claims that he was justified in returning homeward after going no farther than the Chinchas, on the ground that he had there learned of the departure of the Spanish fleet from the coast of South America for an unknown destination. Reduced to legal shape, his contention is, that the vessel being then at the Chinchas, it was the duty of the charterer, under his contract, to have the Spanish fleet then at Valparaiso; in other words, that there was an express or implied warranty on the part of the charterer that whenever the "B. L. Harriman" reached the Chinchas, the Spanish fleet should be at Valparaiso. If there was no such warranty, then clearly the absence of the Spanish fleet was no justification for the course adopted by Capt. Swensen.

7. *Secondly. As to Jansen's understanding of the contract.* He assumes in his letter of 16th June, 1866 (Exhibit E), to Emeric, written after he heard that the Spanish fleet had left Valparaiso, that Capt. Swensen must, under his contract, have proceeded thither; and he asks, in effect, what disposition is to be made of the cargo, if the Spanish fleet is not there ready to receive it.

8. *Thirdly.* As to Emeric's comprehension of it. In his letter of May 17th, quoting his correspondent's suggestions what does he mean by requesting Capt. Swensen to conform to them, *so far as may be in his power?* and in his final letter of May 19th, what does he mean by accompanying the permission then conditionally given, to touch at the Chinchas, with the express stipulation that it shall not prejudice his rights *under the charter party?* Did he understand when he wrote these letters that the charter party as it stood completed by the instructions of May 14th, was superseded, and the vessel released from the obligation of proceeding to Valparaiso? To guard against all chance of misapprehension, Emeric first of all says in effect to Capt. Swensen: "Hold to your charter party; but while proceeding under it to Valparaiso, look out incidentally for the Spanish fleet. Don't forget, however, that you are bound on a voyage to Valparaiso. Don't undertake to cruise in search of the Spanish fleet; but, so far as is in your power — that is, so far as you can, without deviating from the course of your voyage, which is to Valparaiso — seek for the Spanish fleet."

9. When we thus find that all parties concerned have committed themselves to one and the same understanding of this contract, and that its legal construction is entirely in harmony with this understanding, further argument on this branch of the subject seems unnecessary.

10. We admit, however, that the letter of May 17th introduced a *contingent* modification into the existing contract; but as the contingency on which the modification depended never occurred, the rights of the parties must be governed by the contract as it existed, as soon as Valparaiso was designated as the port of destination. We concede that under a fair interpretation of the letter of May 17th, if Capt. Swensen had met the Spanish fleet between the Chinchas and Valparaiso, and the Spanish Admiral had there acted on the option given him in the instructions of May 14th, such action would have been as

valid and effectual there as, in the absence of the letter of May 17th, it would have been at Valparaiso. But the Spanish commander was under no *obligation* to exercise the option given him at any point short of Valparaiso. He was at liberty, if met short of that port, simply to refer Capt. Swensen to his charter party. The letter of May 17th merely provided for anticipating *if the Spanish admiral consented*, the time and place for the acceptance of the whole or part of the cargo, or for directing the partial or entire discharge of the cargo at some port to be designated by him in Peru, Chili, or the Chinchas.

POINT II.

11. The contract being, then, a contract to proceed to Valparaiso, unless otherwise directed by the Spanish Admiral while on the voyage to that port, it is clear that the contract was not performed; inasmuch as the ship only proceeded to the Chinchas, and then, not having found the Spanish fleet, immediately commenced her return voyage to San Francisco.

POINT III.

12. The charterer has stood on his legal rights from the moment of the completion of the contract to the present time; he has in no manner waived performance, nor has he prevented it by any fault of omission or commission.

POINT IV.

13. As a necessary deduction from the foregoing premises no freight has been earned. The owner, Jansen, must account for the full value of the cargo, and must refund the half freight paid in advance.

1 Parsons' Ad'y, 222, Note 1.
Portland Bank *vs.* Stubbs, 6 Mass. 426.
Benner *vs.* Equitable Co., 6 Allen, 222.
Chase *vs.* Alliance I. Co., 9 Allen, 311.

The learned Judge of the District Court made a decision in favor of the ship-owner. His decree was reversed by the Circuit Court. The opinion of each Court is printed in the appendix to this brief, and some observations on the grounds of the decision of the District Court are here added, as presenting the argument for the appellee and the authorities in a convenient form.

14. The learned Judge of the District Court, before whom this case was tried, held that the ship had earned full freight, and he decreed accordingly, awarding the libellant the residue of the proceeds of sale, after deducting freight and expenses.

It is not easy to determine, from an examination of the opinion of the Court, the precise ground on which the decision rests. Certain passages seem intended to assert that the owner fully performed his contract; that he never agreed to go to Valparaiso, but only to seek for the Spanish fleet in certain waters, and that he performed this contract by sufficiently seeking for the fleet in the waters designated (See printed opinion, p. 11; head and foot of p. 13). On the other hand, other passages seem to concede that under *the terms of the contract* the vessel was bound to proceed to Valparaiso, but that the anticipated danger of entering that port, or the absence from it of the Spanish fleet (the "B. L. Harriman" being then at the Chinchas), discharged the vessel from this obligation, and, moreover, entitled her to the full stipulated freight as if she had fully performed her entire contract (Opinion, pp. 13, 14, 15).

15. These defences cannot *both* be sustained. It cannot be that the carrier's contract was completely fulfilled, and at the same time that he was prevented from fulfilling it.

16. Having already examined the written instruments in this case for the purpose of ascertaining under what contract the "B. L. Harriman" left this port, and having arrived at the results indicated in 10, we do not propose to reinvestigate that

subject. It may be remarked, however, that to hold, in a charter party providing for a voyage to a certain port and delivery there to a designated consignee, that the vessel is not bound to proceed to the specified port if the consignee is absent, and that the contract is rather to find the consignee than the port of delivery, is to assume a position directly at variance with commercial usage, and legal authority.

The tendency of the reasoning on p. 11 of the opinion as to the " object " of the voyage, and the " substance " of the contract, is to assert that under this charter party, Emeric guaranteed that the Admiral of the Spanish fleet should be at Valparaiso, not merely as soon as the " B. L. Harriman " was there, ready to deliver, *but as soon as she arrived at the Chinchas.* The same course of reasoning would conduct us to the conclusion that if Captain Swensen, before he left the harbor of San Francisco, had received the same intelligence which was subsequently communicated to him at the Chinchas, and had then put back to the wharf, the ship would have been entitled to full freight.

The learned judge has himself stated (Opinion, p. 7), that the absence of the consignee, or the impossibility of making delivery, cannot prevent the ship from earning her freight if she proceeds to the port of destination and is duly there ready and willing to deliver.

17. The duty of Captain Swensen, under the charter party, was perfectly clear, namely: to proceed to the port of Valparaiso, unless otherwise directed by the Spanish Admiral while on the voyage; on arriving there, to wait the twenty lay-days, and if no consignee then presented himself to store the cargo at Emeric's risk (See Opinion, p. 7).

Suppose the cargo had been consigned to the President of an incorporated Gas Company, and that while the vessel was at the Chinchas, authentic intelligence had been received that the company had been dissolved, and that the President had absconded

to parts unknown, would freight then have been earned by turning back to San Francisco? If not in that case, why in this?

For aught that appears, the Spanish Admiral may have left an agent at Valparaiso, empowered to accept a delivery of the coal, and indorse the bill of lading.

Why, then, did not Capt. Swensen proceed to Valparaiso and there follow the usual course of procedure, either by delivering the cargo, or doing that which, so far as the earning of freight is concerned, is legally equivalent to delivery, namely: storing the cargo at the consignee's risk?

18. The reason suggested as excusing him from adopting this course (though it is held, nevertheless, that he earned his full freight) is, that the hostile feeling of the Chilians would have rendered such a proceeding extremely hazardous. This brings us to the question whether, if *according to the terms of the contract* it was the duty of the "B. L. Harriman" to enter the port of Valparaiso, unless otherwise directed by the Spanish Commander, she could be allowed, at the safe distance of twenty degrees of latitude, to say that the danger of entering the port discharged her from her positive obligation to enter it, and that she is now entitled to full freight, as if she had entered it, and there delivered or stored her cargo.

19. We respectfully submit that the *meaning of this contract* is not to be influenced in any manner by the result of the warfare between Spain and Chili. The consideration (Opinion, p. 10) that the attempt to enter Valparaiso would have exposed the cargo, perhaps the vessel, to seizure and confiscation does not aid us in the slightest degree in arriving at a true construction of the agreement; while if it is urged as a justification for a conceded departure from the terms of the contract, it cannot be sustained. The parties to this contract had not the benefit of our *ex post facto* experience, and the terms of their agreement should not, therefore, be interpreted by *ex post facto* considera-

tions. They both supposed that the Spanish fleet would always be able, while hostilities lasted, to keep the port of Valparaiso open for Spanish vessels and supplies forwarded for the squadron. Valparaiso was bombarded without effectual resistance March 23d, and was defenceless before the guns of the fleet, which, after inflicting severe punishment on the place, sailed to Callao, some twenty degrees to the north, and there, on the 2d May, met with a serious and very unexpected repulse. The vigorous defence made by Callao was matter of universal surprise; for up to that period the impression had everywhere prevailed that Peru and Chili could oppose no effectual resistance to the armament of Spain.

20. The contract to proceed to Valparaiso was absolute, subject only to the contingency of other directions from the Spanish Commander (10). Emeric did not guarantee that it should be a "safe" port; the contract was made while war was waging, and the profit or loss involved was, from the very nature of the agreement, almost certain to be very materially affected by the result of the pending hostilities.

21. It is a proposition too clear for argument that where a party undertakes positively to perform a certain act for a certain stipulated compensation, he cannot claim the compensation, however difficult or impossible performance may be, so long as the act remains unperformed, unless, indeed, the non-performance is owing to the fault or omission of the other contracting party. Dermot *vs.* Jones, 2 Wallace, 1. Thus, when a ship is chartered for a port known to be blockaded, or for a port which is subsequently put under blockade, the risk or impossibility of entry can never be urged on behalf of the ship as entitling her to freight, as if the voyage had been performed.

Scott *vs.* Libby, 2 Johns. 340.
Burrill *vs.* Cleeman, 17 Johns. 72.
Palmer *vs.* Lorillard, 15 Johns. 12 (14). 16 Johns. 355 (356).

Pole *vs.* Cetovich, 9 C. B. (N. S.) 430.
Schilizzi *vs.* Derry, 4 El. and B. 873.
The "Hiram," 3 Rob. Ad. 180.
Atkinson *vs.* Ritchie, 10 East. 530.
Osgood *vs.* Groning, 2 Camp. 468.
Hadley *vs.* Clarke, 8 D. & E. 265.
Medeiros *vs.* Hill, 8 Bing. 231.
Abbott Shipping (468), 596. (Smith *vs.* Wilson.)
Abbott Shipping (452), 578. (Liddard *vs.* Lopez.)

Same rule is applied against charterer.

Bright *vs.* Page, 3 B. and P. 296, Note.
Barber *vs.* Hodgson, 3 M. and S. 267.
Field *vs.* Chase, Lalor's Suppt. H. & D. 50.
Vlierbloom *vs.* Chapman, 13 M. and W. 230.

22. The whole law of the case may be summed up in the following quotation from Mr. Justice Story's opinion in the Nathaniel Hooper, 3 Sumn. 542, 555: "I think the whole of the cases, in which the full freight is, upon the ordinary principles of commercial law due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement that the non-arrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant shipper."

See also 1 Parsons' Ad'y. 152.

23. Now, what waiver or default of Emeric has been shown? None whatever. Is not the decision really based on the fact that, by reason of the casualties of war, Valparaiso could not be entered without apprehended risk of the seizure of the vessel? Suppose the result of hostilities had been alto-

gether different, and that Valparaiso had been a "safe" port, would it then have been held that the vessel was justified in immediately turning homeward after touching at the Chinchas, and that by this proceeding she earned full freight? But the meaning of the contract is the same whether by the fate of war Valparaiso was held by the Chilians or by the Spanish fleet; and if we admit that by the terms of the contract the vessel was bound to proceed to Valparaiso, the only inquiry left is, whether the apprehended danger justified non-performance, and entitled the vessel, on proceeding to the "Chinchas" and turning immediately homeward, to demand full freight.

24. Suppose Jansen had sued to recover his freight, could he have alleged *performance?* Certainly not. He would have been obliged, acting on the suggestion contained in p. 15 of the printed opinion, to set up that performance had been prevented by reason of events chargeable to the charterer. But what events? Why could he not proceed to Valparaiso? Because such a step was dangerous? But did Emeric ever undertake that it should be safe? Because the Spanish Admiral was not there? But did that circumstance *prevent him from going to Valparaiso?* We do not ask why he did not actually deliver his cargo to the Spanish Admiral, but why he did not bring it to Valparaiso or any farther than the Chinchas. Could he not, but for the danger of seizure (which was one of the perils he necessarily assumed by the terms of the contract), have entered the port of Valparaiso, and, in the absence of the consignee, stored the cargo at the charterer's expense, and thus done what would have been legally equivalent to delivery? The supposed danger was the obstacle, and that obstacle was no legal excuse.

25. The suggestion that Capt. Swensen's conduct can be sustained and freight awarded on the principle that, owing to an unforseen emergency, he acted for the interests of all parties, and bound them by his action (Opinion, p. 12), is answered by

the fact that no such emergency existed, and by the legal considerations set forth in Miston *vs.* Lord, 1 Blatchf. 357; Atkinson *vs.* Ritchie, 10 East. 530; and Vlierbloom *vs.* Chapman, 13 M. and W. (239.)

B. R. CURTIS,

Of Counsel with Libellant and Appellee.

EXHIBIT A.

This Charter Party, made and concluded upon in the city of San Francisco, the seventh day of May, in the year of our Lord, one thousand eight hundred and sixty-six, between Charles J. Jansen, merchant of this city, owner of the British ship "B. L. Harriman," of the burthen of 576 tons or thereabouts, register measurement, now lying in the harbor of San Francisco, of the first part, and Jos. Emeric, of San Francisco, of the second part.

Witnesseth, that the said party of the first part agrees on the freighting and chartering of the whole of said vessel (with the exception of the deck, cabin, and the necessary room for the crew and the stowage of provisions, sails and cables), or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific, the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole or none, and to send her if he desires to another port in Chili, Peru, or the Chincha Islands: and in that case the vessel will immediately proceed to the port

which will be named by said commanding officer, and there complete her discharge on the terms following: The said vessel will be tight, staunch, strong, and every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned; and no goods or merchandise shall be laden on board otherwise than from the said party of the second part or his agent. The said party of the second part doth engage to provide and furnish to the said vessel a cargo of coal now on board of the said vessel consisting of seven hundred eight-six (786) tons of 2,240 lb. of Newcastle West Hartley steam coal. Should the vessel be detained at San Francisco by any unforeseen occurrence, this charter party to be null and void, and the coal to be discharged at ship's expense, at a convenient wharf in San Francisco, and to pay to said party of the first part, or his agent, for the use of said vessel during the voyage aforesaid fifteen dollars per ton of 2,240 lbs., in United States Gold Coin, one-half to be paid here to C. J. Jansen of San Francisco two days after the sailing of the vessel, less two and one-half per cent discount for cash; and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that the coal has been delivered: vessel to be dunnaged to the satisfaction of Charterers, and to furnish to them a certificate from Lloyd's surveyor that he has surveyed the vessel, and that she is satisfactory to him as regards general condition, stowage and draft of water: vessel to employ the stevedore usually employed by charterers, and to be stowed under the captain's supervision and direction: vessel to pay United States Revenue Stamps. It is agreed that the lay-days for loading and discharging shall be as follows: to commence twenty-four hours after the captain reports himself ready to receive or discharge cargo. Twenty (20) running lay-days to discharge at the port of discharge, or between the ports of discharge, if the privilege within-mentioned is used. And that for

each and every day's detention by default of said party of second part, or his agent, one hundred dollars ($100) per day, day by day, shall be paid by said party of the second part, or his agent, to said party of the first part, or his agent; cargo to be received from alongside a wharf at San Francisco, and deliverable at ship's tackles at port or ports of discharge, vessel to be free of commission at port or ports of discharge.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other in the penal sum of Amount of Charter.

In witness whereof, we have hereunto set our hands the day and year first above written.

CHAS. J. JANSEN. [L. S.]
JOS. EMERIC. [L. S.]

Signed and sealed in the presence of

JNO. MEL.

EXHIBIT B.

SAN FRANCISCO, May 14, 1866.

CAPTAIN G. C. SWENSEN, of the Hawaiian ship "B. L. Harriman," present.

Dear Sir: — "In accordance with the conditions of the charter party entered into between Ch. J. Jansen, owner of the ship "B. L. Harriman" (now under your command), and myself, on the 7th inst., I hereby name you the port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San Francisco, and when there, to report yourself to the commanding officer of the Spanish Navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and if he desires, to send you to another port in Chili, Peru, or the

Chincha Islands; in which case, you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter party. I herewith hand you a letter for the commanding officer of the Spanish Navy at Valparaiso, which contains the bill of lading of your entire cargo of coal indorsed to his order, a duplicate of the charter party, and of this letter."

I remain, Dear Sir, yours truly,

JOSEPH EMERIC.

EXHIBIT C.

SAN FRANCISCO, May 17, 1866.

CAPTAIN G. C. SWENSEN, of the Hawaiian ship "B. L. Harriman," present.

Dear Sir:—"Since addressing you the foregoing letter of the 14th, I have received from Panama, under date of April 23d last, the following instruction, a copy of which I herewith furnish you.

"'On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further order, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operations. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas.' As far as it is in your power you are hereby requested by me to follow the above instructions."

JOSEPH EMERIC.

EXHIBIT D.

SAN FRANCISCO, May 19, 1866.

CAPTAIN G. C. SWENSEN, of the Hawaiian ship "B. L. Harriman."

Dear Sir: — "In case the wind, weather, or other circumstances favor your making the Chincha Islands, you are at liberty to call there, without, however, prejudicing my rights under the charter party and instructions."

I remain, Dear Sir, yours, &c.,

JOSEPH EMERIC.

EXHIBIT E.

JOSEPH EMERIC, Esq., San Francisco.

Dear Sir: — "In your charter of the ship 'B. L. Harriman,' there is no provision made for the possibility of there being nobody to receive her (the ship's) cargo on arrival, nor do I know that the Captain of the 'Harriman' has your private instructions on this point.

"At the time of making the charter we could hardly contemplate anything of the kind, hence the omission. Late developments make this possible, and wish you will make some provision in the event such should be the case, and instruct me how to act that I may communicate same to Capt. Swensen.

Yours, very respectfully,

CHAS. J. JANSEN.

San Francisco, June 16th, 1866.

EXHIBIT F.

It is not deemed necessary to set forth this document in full, but only those portions of it which bear on the construction of the contract, and Capt. Swensen's understanding of it.

Protest of Capt. Swensen, made at San Francisco, October 8th, 1866, states that he left port May 22d, "bound first for the port of Valparaiso, Chili, via the Chincha Islands"; that on the 4th August he ran into the Chinchas, and there learned that the Spanish fleet had hauled off from Chilian ports and left for parts unknown, and satisfied himself that further search for the Spanish fleet was useless.

Returned the same day to his ship; put back for San Francisco; arrived there October 6th.

Protest ascribes *the breaking up of the voyage* to "the withdrawal of the Spanish fleet and the absence of the commanding officer thereof"; and states that the "withdrawal and absence" of the commanding officer and his "whereabouts rendered the delivery of cargo impossible."

OPINION OF JUDGE FIELD.

On the 7th of May, 1866, C. J. Jansen, the owner of the ship "B. L. Harriman," chartered her to Joseph Emeric, the libellant, for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific, the port of discharge to be designated before the sailing of the vessel. The charter party provided, that instructions for the vessel should be given by letter in triplicate; and if the vessel proceeded pursuant to

them direct to Valparaiso, the commanding officer of the Spanish navy, who was supposed to be at that port, should have the right to receive a portion of the cargo there, or the whole of it, or to decline to receive any portion there, and to send the ship to another port in Chili, Peru or the Chincha Islands; and in such case that the vessel should proceed immediately to the port named by him, and there complete her discharge.

The charterer on his part agreed to provide the vessel with a cargo of coal of seven hundred and eighty-six tons, and to pay for the use of the vessel during the voyage fifteen dollars per ton, in gold coin of the United States, one-half to the owner at San Francisco two days after the sailing of the vessel, less two and a half per cent discount for cash; and the other half to the owner on receipt of a cancelled bill of lading that the coal had been delivered.

On the 14th of May the charterer wrote to the master of the ship a letter designating the first port of Valparaiso as the port to which he was to proceed with his vessel on leaving San Francisco, and directing him when there to report himself to the commanding officer of the Spanish navy, and stating that such officer would have the right to take the whole of the cargo or a portion of it, or to refuse to take any portion, and to send the vessel to another port, as mentioned in the charter party.

On the 17th day of May the charterer wrote to the master a second letter, stating that since addressing his previous letter he had received from Panama what he terms "an instruction," which he encloses. This instruction is an extract from a letter of his correspondent, requesting him, if he had not attended to all outstanding orders, to suspend operations until further orders, giving as a reason that it was probable that the Spanish naval forces might have changed their base of operations; but directing him, if he had taken up a vessel before

receiving the letter, to "instruct the ship to seek after the fleet between the port of Valparaiso and the Chinchas." The charterer added to the extract a request that the master would follow the instruction as far as was in his power.

On the 19th of May the charterer sent another communication to the master, informing him that in case the wind, weather or other circumstances favored his making the Chincha Islands he was at liberty to call there, without, however, prejudicing the charterer's rights under the charter party and instructions.

The vessel sailed from San Francisco on the 22d of May, and arrived at the Chinchas on the 3d of August. Whilst there the master was informed of the bombardment of Callao on the 2d of May, and that the Spanish fleet had sailed away badly shattered. On the same day, a regular Chilian mail steamer arrived, and reported that all was quiet at Valparaiso, and that nothing was known of the Spanish fleet. After remaining a few hours at the Chinchas, the vessel left, and the captain immediately ordered her back to San Francisco, where she arrived, on the 6th of October. On the 8th he made a formal protest, and served a copy on the charterer. The owner then insisted that he was entitled to the full freight which was stipulated for the performance of the voyage, and called upon the charterer to receive the cargo, discharge the vessel, and pay the balance of the freight claimed. To this demand the charterer refused to accede, alleging that the voyage agreed upon had not been performed. The shipowner thereupon paid the duties upon the cargo, discharged the vessel, and had the coal sold. The charterer then libelled the vessel for breach of the charter party, and the conversion of the cargo to the owner's use.

The District Court held, that full freight had been earned by the ship, and entered a decree in favor of the charterer for the

residue of the proceeds of the sale of the coal, after charging him with the expenses of sale, etc. From this decree the libellant has appealed.

Two questions are thus presented for determination: First, what was the contract between the shipowner and the charterer? And second, was that contract performed by the ship, or was its performance waived by the charterer, or prevented by his fault or omission?

The charter party provided for a voyage to any port of the Pacific, to be named before the sailing of the vessel, and for written instructions upon this point. These instructions were given in the letter of May 14th, and the port of Valparaiso was named. The contract thus became, in this particular, clear and explicit. The charter party stipulated for the exercise of certain rights over the coal and vessel by the commander of the Spanish navy at Valparaiso, and the instructions repeated the stipulation, and directed the master of the vessel *when there* to report to him. Both documents were evidently drawn upon the supposition that the Spanish commander was at the time at the port of Valparaiso, and would be found there upon the arrival of the vessel. No serious question could be raised upon these documents standing alone. A change in the contract thus accepted, and a new destination of the vessel, are supposed to have been effected by the letter of May 17th. But that letter only directed the master of the vessel to seek the Spanish fleet between Valparaiso and the Chinchas. It was an instruction founded upon the supposition that the fleet might have changed its base of operations. There was no certain knowledge that such change had taken place; it was suggested as a possibility only, in consequence of which the vessel was to seek for the fleet in passing between the Chinchas and Valparaiso. The contract to proceed to Valparaiso was not abandoned. None of the par-

ties concerned understood the letter as changing the port of destination. The master did not so understand it. In his protest, after his return, he declared that his vessel left San Francisco bound for the port of Valparaiso *via* the Chincha Islands. He did not pretend that he had made the voyage for which the charter party stipulated, but contended that the voyage was broken up, and his return to San Francisco justified by the withdrawal of the Spanish fleet from the coast of Chili, and the absence of its commander, the consignee of the cargo.

The owner of the ship did not so understand the letter. He assumed in a communication to the charterer, written on the 16th of June, nearly a month after he had learned of the departure from Valparaiso of the Spanish fleet, that the vessel was obliged under the contract to proceed to that port; for he mentioned that no provision was made in the charter for the possibility of there being nobody to receive the cargo on the arrival of the ship, and asked for instructions in that event to communicate to the captain.

The charterer did not so understand the letter. He only requested a compliance with the suggestion of his correspondent so far as it was in the master's power; and in his communication of May 19th, he accompanies his permission to touch at the Chinchas with the stipulation that it should not prejudice his rights under the charter party and instructions. But besides this, he testifies that, at the request of the shipowner, he wrote to his *friends* at Panama — his associates or agents in the business of supplying the Spanish fleet — to designate some one at Valparaiso to receive the cargo in the event that the Spanish commander had left on the ship's arrival. The owner was himself examined as a witness, and no denial of this statement was made.

Thus all the parties concerned construed the contract in the

same manner, and did not regard its purport or obligation as in any respect changed by the letter of May 17th. We may, therefore, safely treat the letter as simply a request that the captain would comply with the suggestion of the charterer's correspondent at Panama, so far as he could do so consistently with the provisions of the charter party; and that it neither had, nor was intended to have, any other or greater import. If the vessel had intercepted the Spanish fleet between the Chinchas and Valparaiso, the acceptance at sea of the cargo, or a portion thereof by the Spanish commander, would have been as valid and binding as, in the absence of the letter of May 17th, such acceptance would have been at Valparaiso. But there was no obligation resting upon the commander to accept at sea the cargo, or any part thereof, or to make there the option given by the charter party. He could have pointed to that instrument and replied, that he would exercise his rights and privileges thereunder at Valparaiso. The letter simply provided for anticipating, if the Spanish commander consented, the time and place for the acceptance of the cargo, or for directing its partial or entire discharge at some other port.

Such being in our judgment the obvious construction of the letter of May 17th, it follows that the original contract completed by the instructions of May 14th, requiring the vessel to proceed to Valparaiso, was not subsequently changed; and as the vessel only proceeded to the Chinchas, such contract was not performed.

But it is contended that performance was waived by the fact that the Spanish commander, the consignee of the cargo, had left Valparaiso; and that the captain was justified in avoiding the risk of possible seizure of the cargo by the authorities at Chili, which it is assumed he must have incurred had he proceeded to that port in the absence of the Spanish fleet.

The departure of the consignee named from the port of des-

tination constituted no waiver of the contract. The contract was not to find the consignee, but to find the port of delivery. It may be that the consignee had appointed agents to appear for him and represent his interests; and if he had not done so the law indicated the course which the master of the vessel could have pursued, — he could have stored the cargo at the shipper's risk. The storing in such case would have been, so far as the earning of freight was concerned, the legal equivalent to delivery to the consignee. Suppose, by way of illustration, the case stated by counsel, that the cargo had been consigned to the president of an incorporated company, and while the vessel was at the Chinchas, authentic intelligence had been received that the company had been dissolved, and that the president had absconded to parts unknown, and thereupon the ship had retraced her course back to San Francisco; would it be pretended in such case that the freight stipulated for the entire voyage had been earned? And if freight would not have been earned in that case, why can it be considered earned in this case? The law of the contract is not changed by the fact that the consignee in one case is a naval commander, whose fleet has sailed from the port of destination, and in the other case is the absconding president of a dissolved company. The principle on which the right to freight depends is simple and well settled. Freight is the compensation for the carriage of the cargo. If the carriage be not made, the freight is not earned. The contract is an entirety; it must be executed completely, or no claim for compensation arises. Such is the general rule, and it is immaterial whether the failure of the carrier arises from his fault or his misfortune. Thus if the carriage be prevented by a blockade of the port of destination, whether such blockade were known or not at the time the contract was made, the freight is not earned. The risk or even impossibility of entering the port in such case constitutes no ground upon which com-

pensation can be claimed, though the voyage be in other respects performed. The only exception to the rule that performance must precede the right to compensation is, where such performance is prevented by the fault or omission of the shipper.

In Scott *vs.* Libby (2 John. 336), a vessel was chartered for a voyage from New York to the city of St. Domingo and back. The charterer was to pay an entire sum for the whole voyage in sixty days after the return of the vessel. On arriving in sight of St. Domingo, the vessel was turned away by a British cruiser on account of the blockade of the port. The vessel thereupon returned to New York, and the owners refused to deliver the cargo until the freight was paid. In an action of trover for the conversion of the cargo, it was held by the Supreme Court of New York that no freight was due, that the blockade had dissolved the charter party, and the claim for freight was gone. The case of Burrill *et al. vs.* Cleeman, 17 Johns. 72, is to the same purport.

The risk and danger of losing the cargo in performing, or attempting to perform, a stipulated voyage, may be shown in answer to a claim preferred by the shipper for the breach of the contract; but this is a very different thing from the assertion of a right to compensation where the contract is not performed. When compensation is made dependent upon performance, there must be performance, however difficult or dangerous. The difficulty or danger may, in some instances, relieve the carrier from more than nominal damages for not performing the contract, but neither will entitle him to the slightest compensation when the performance is not had.

In this case the contracting parties knew of the war existing between Spain and Chili, and the possible risks and dangers to be encountered in the voyage to Valparaiso. The charterer did not guarantee that the port would be safe, or warrant that the Spanish naval commander would be there to protect the vessel

on her arrival. It is probable that both parties expected that he would at all times be able to extend protection to the vessel; but as they made no provision for a possible disappointment in this expectation, and for compensation upon such event, we do not perceive upon what principle we can interpolate into the contract a provision of that kind, or, which is equivalent to the same thing, allow compensation as if such provision existed.

Suppose, as counsel pertinently inquires, the shipowner in this case had sued the charterer for freight; could he have alleged performance of the contract? Clearly not, for no such performance was had. Could he have alleged that the performance was prevented by the charterer? Certainly not, for the charterer had done nothing to prevent the execution of the contract, nor had he omitted anything for which he stipulated, either expressly or impliedly. What, then, could the owner have alleged as a reason for not proceeding to Valparaiso? — that the Spanish naval commander was not there? But the charterer did not agree that he should be there; nor did his absence prevent the vessel from entering the port. But then, there was danger that the cargo might be seized by the Chilian authorities. This possibility of seizure was one of the perils assumed by the contract, and like a similar danger where the port of destination is blockaded, did not waive the necessity of performance as a condition precedent to compensation.

Our conclusion is, that the charter party was not performed by the ship; that the freight stipulated for such performance was not, therefore, earned; and that the charterer was entitled, upon the arrival of the vessel at San Francisco, to the possession of the cargo and to a return of the advanced freight. Watson *vs.* Duykinck, 3 John. 335; Griggs *vs.* Austin, 3 Pickering, 20; and Phelps *vs.* Williamson, 5 Sand. 598. The decree of the District Court must therefore be reversed, and a decree entered in favor of the libellant for the amount of the advanced

freight, and the amount of the proceeds of the sale of the coal, after deducting therefrom the duties paid and the expenses of sale, together with interest on both amounts and costs of suit.

FIELD J.

NOVEMBER 4, 1867.

UNITED STATES DISTRICT COURT,
DISTRICT OF CALIFORNIA.

JOSEPH EMERIC, LIBELLANT,

vs.

THE SHIP "B. L. HARRIMAN," AND C. J. JANSEN, OWNER.

OPINION OF JUDGE HOFFMAN.

On the 7th May, 1856, Joseph Emeric chartered the above-named vessel for "a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific, the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct, by the instructions given, to Valparaiso, the commanding officer of the Spanish navy will have the right to receive only a part of the cargo there, the whole or none, and to send her, if he desires, to another port in Chili, Peru, or the Chincha Islands; and, in that case, the vessel will immediately proceed to the port which will be named by said commanding officer, and there complete her discharge."

The charterer, on his part, agreed to provide the vessel with a cargo of seven hundred and eighty-six tons of coal, and to pay for the use of the vessel during the voyage aforesaid, "fifteen dollars in gold coin per ton of 2,240 pounds, one-half to be paid

here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, less two and one-half per cent discount for cash, and the other half to C. J. Jansen, of San Francisco, on receipt of cancelled bill of lading that coal has been delivered."

Twenty running lay days to be allowed at port of discharge, or between ports of discharge, if privilege above mentioned be used; and for every day's detention by fault of charterer or his agent, one hundred dollars to be paid.

On the 14th May, 1866, the charterer wrote to the master as follows:

"In accordance with the conditions of the charter party, entered into between Ch. J. Jansen, owner of the ship, "B. L. Harriman" (now under your command), and myself, on the 7th inst., I hereby name you the port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San Francisco, and, when there, to report yourself to the commanding officer of the Spanish navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and, if he desires, to send you to another port in Chili, Peru, or the Chincha Islands; in which case, you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter party. I herewith hand you a letter for the commanding officer of the Spanish navy at Valparaiso, which contains the bill of lading of your entire cargo of coal indorsed to his order, a duplicate of the charter party, and of this letter."

On the 17th May, the libellant addressed to the master a second letter as follows:

"Since addressing you the foregoing letter of the 14th, I have

received from Panama, under date of April 23d last, the following instructions, a copy of which I herewith furnish you:

"'On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further order, including even the last one thousand tons of coal; for it is more than possible that the naval forces down there will have changed their base of operations. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship to *seek* after the fleet between the port of Valparaiso and the Chinchas.'

"As far as it lies in your power, you are hereby requested by me to follow the above instructions.

"Yours, &c.,

"JOS. EMERIC."

On the 19th May, the charterer further informed the master that in case the wind and weather, or other circumstances, favored his making the Chincha Islands, he was at liberty to call there, without, however, prejudicing the charterer's rights under the charter party and instructions.

On the 16th June, the owner addressed the charterer as follows:

"In your charter of the ship 'B. L. Harriman,' there is no provision made for the possibility of there being nobody to receive her (the ship's) cargo on arrival, nor do I know that the captain of the 'Harriman' has your private instructions on this point. At the time of making the charter, we could hardly contemplate anything of the kind, hence the omission. Late developments make this possible, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Capt. Swenson.

"Yours, &c.,

"CHAS. J. JANSEN."

To this letter, no answer was returned.

The vessel sailed from this port on the 22d May. nearly a month prior to the date of the above letter. He availed himself of the privilege of touching at the Chincha Islands, where he arrived August 3d. He there was informed of the bombardment of Callao, on the 2d May, and that the fleet had sailed away badly shattered. On the 3d August, a regular Chilian mail steamer arrived, which reported that all was quiet at Valparaiso, and that nothing was known of the Spanish fleet. The inquiries of the captain were necessarily prosecuted with much caution; for if the destination of his cargo had been known, both it and the vessel would have been seized, for the feeling against the Spaniards was very bitter. The same results would have followed if he had proceeded to Valparaiso after the departure of the Spanish fleet.

The course of the voyage had naturally carried him to about the latitude, and within a few hundred miles of Valparaiso, and the information he received at the Chinchas was corroborated by the fact that he had observed a vessel going into that port, indicating that the blockade had been raised.

In point of fact, the fleet was then in a remote part of the Pacific Ocean, having arrived at Tahiti about the middle of June, and left there in July.

Under these circumstances, the captain rightly concluded that it would be impossible to deliver the cargo to the commander of the fleet, and, as it would be liable to seizure and condemnation at Valparaiso, he determined to bring it back to this port.

On the arrival of the vessel, the owner called upon the charterer to receive his coal, enter it at the Custom House, and pay the freight due. This the charterer declined to do, alleging that the voyage agreed on had not been performed. The coal was subsequently entered at the Custom House by the shipowner, and the duties paid. It was then sold, and the proceeds are in his hands.

The libellant thereupon brought suit for damages in the sum of $40 000.

The claimant asserts that he was at all times ready and willing to deliver the coal on payment of the freight due thereon. That he had a lien thereon for the sum of $5,883, being the balance of down freight, as stipulated in charter party; and also for $117.66 for return freight from the Chincha Islands to this port.

The principles on which the right of the shipowner to freight rests are simple and well settled. If the cargo be not delivered at the port of destination according to the bill of lading, no freight is in general due. It is immaterial whether the delivery be prevented by the fault or the misfortune of the carrier. Thus, if the voyage be broken up by a peril of the sea, or if the delivery be prevented by a blockade of the port of destination, the carrier's contract is not performed, and no freight is earned.

Abbott on Ship. ch. 9, *passim.*
Kent's Comm. ch. 47.
Parsons on Mar. Law, vol. 1, ch. 7.

But if the delivery be prevented by the fault of the shipper or by causes for which he, and not the carrier, is responsible, the latter is entitled to his freight. Thus, if the consignee cannot be found, or if he refuses to receive, the master may entitle himself to freight by landing and storing the goods at the shipper's risk, notwithstanding that, by the terms of the bill of lading, the freight is to be paid only on delivery to the consignee or his assigns. So if the master has waited a reasonable time after tendering the goods to the consignee, during which the latter has declined to receive, the carrier's contract will be deemed to have been performed, his extraordinary liability terminated, and his freight earned, notwithstanding that the cargo be lost, without fault on his part, before delivery.

Clendamel *vs.* Tuckerman, 17 Barb. 184, and cases cited.

So if the landing of the goods be prohibited by the public authorities, the misfortune is deemed that of the shipper, and the freight is earned; for, says Prof. Parsons (Par. Mar. Law, p. 152), "the shipowner has done all he was bound to do."

Ins. Co. of N. America *vs.* Morgan, 4 Dallas, 455.

In this case, the Court says: "I think it most agreeable to reason and justice that the obtaining permission to land the cargo should in this case be considered the business of the consignee."

This decision is in accordance with the opinion of Boulay Paty (1 Dr. Comm. & Mar., tome 2, p. 392), and of Valin (Comm. liv. 3, tit. 3, art. 9, vol. 1, p. 650), who cites a sentence of the Court of Marseilles, and the opinions of Loccenius Straccha and Stypmanus.

Boulay Paty seems to think it unquestionable that the master is not only entitled to his outward freight, but also to freight for the return voyage, provided he did not know that the landing of the goods was prohibited.

The general rule would thus seem to be, that no freight is earned if the non-delivery be due to the fault or misfortune of the shipowner. But if the latter has done all that he was bound to do, and the non-delivery be attributable to the fault or misfortune of the shipper, or to causes for which he should be held responsible, the carrier will be entitled to freight.

The right of the shipowner, in the present case, to freight will therefore depend upon whether he has done all that, under his contract, he was bound to do, and whether the failure to deliver has arisen from causes the consequences of which should be borne by the shipper.

What, then, were the carrier's duties under his contract? It is urged that the port of destination of the voyage was Valparaiso, and that the ship having failed to proceed to, and deliver at that port, no freight has been earned.

In determining whether this be the true construction of the contract, its terms and the circumstances under which it was made must be considered. It was known to both parties that war existed between Spain and the Republics of Chili and Peru. The coals shipped were intended for the supply of the Spanish fleet, then supposed to be engaged in active hostilities against the city of Valparaiso.

The first letter of instructions, therefore, designated Valparaiso as the port to which the vessel should proceed, and on arrival she was to report to the commanding officer of the Spanish fleet. It is obvious from this language, and from the circumstances as well understood by both parties, that the consignee of the cargo was the Spanish Admiral. No landing of the cargo or delivery at Valparaiso, in the usual sense, was contemplated by either of the parties. To have attempted it would have exposed the cargo, perhaps the vessel, to seizure and condemnation. The real object of the voyage was to reach the Spanish fleet, supposed to be off Valparaiso, or in the harbor, prosecuting hostilities against the city.

That the ship was not expected to go to Valparaiso, at all events, is clear from the terms of the second letter of instructions. After informing the master that the fleet might have changed its base of operations, the charterer in effect directs him "to seek after it between Valparaiso and the Chinchas." It will not be pretended that if the vessel had encountered the fleet between those ports, or in the neighboring waters, and had delivered or offered to deliver her cargo, that her voyage would not have been performed and her freight earned.

The object of the voyage and the substance of the contract, therefore, was not to convey to and deliver at Valparaiso a cargo of coals, but to convey and deliver it to the Spanish fleet, the whereabouts of which was uncertain, but which was to be sought for in certain waters. Had the ship gone to the vicinity

of Valparaiso, or as near thereto as she might safely have approached, and then, having ascertained that the fleet had departed, proceeded to search for it, and not finding it after reasonable efforts, brought back the cargo to this port, I presume there would be no doubt that she had fulfilled her contract.

The case would then be precisely analogous to that of a consignee unwilling or unable to receive at the port of destination, where the landing of the cargo is prohibited, or where to land it would occasion its loss from the want of storehouses or the like. In such cases, an involuntary agency is thrown upon the master, requiring him to act for the best interests of the owner; and if he does so, he is entitled, according to the opinion of Boulay Paty and of Valin, to freight for the homeward as well as the outward voyage, if the goods be carried back to the place of departure.

It appears in the case at bar that the master, in the course of his voyage, approached to within a short distance of the port of Valparaiso; that he there observed indications which led him to suppose the fleet had left, and that, availing himself of the liberty to touch at the Chinchas given him by his instructions, he continued his voyage to those islands, looking out on the way for the fleet.

At the Chinchas he ascertained, what has since proved to be the fact, that the further prosecution of the voyage to Valparaiso, or a continued search for the fleet, would be useless. He has thus, according to the letter of his instructions, sought for the fleet between Valparaiso and the Chinchas. To say that he was bound to go to and enter the harbor of Valparaiso, in order to deliver coals to the fleet which he knew was not there, when no delivery could be made, nor bills of lading be cancelled by the Spanish Admiral, and when, by so doing, he exposed the cargo and the vessel to confiscation, would be to give to the contract in this case a construction unreasonable if not absurd.

If, as I think must be admitted, no landing of the cargo at Valparaiso was contemplated by either party, but only a delivery to the Spanish Admiral or to his order, the voyage to the harbor of Valparaiso to obtain ocular proof of the departure of the Spanish fleet, a fact of which he was already advised, would have been not only idle, but unjustifiable; for it would have exposed the cargo to risks wholly unnecessary.

I think, therefore, that the shipowner has, under the circumstances, done all that he was bound to do. The ship has sought for the fleet in the waters designated by the charterer, and she has continued her voyage until it became apparent that it was impossible to accomplish its object; she has failed to seek her consignee in the harbor where it was supposed she would meet him, only because it was ascertained he was not there; that, owing to his absence, no delivery could be made as contemplated by the shipper, and that to attempt what was known to be impossible would unwarrantably jeopardize the interests of both shipowner and shipper.

It is not suggested that any other or more advantageous disposition of the cargo could have been made than to bring it back to this port.

The circumstances of this case are novel. I have found no similar reported case. But analogous cases must frequently have arisen. If, for example, a vessel were chartered to convey supplies to be delivered to another vessel at a certain point in mid-ocean, or in a harbor of a barbarous country where the goods could not be landed or safely stored, and the ship were to proceed to the designated point, or to the specified harbor, and not finding, after reasonable efforts, the vessel which was to receive the goods, should bring them back to the port of shipment, it would not be doubted that she had earned her freight.

But suppose that, on her way to the point of rendezvous, she learns that the vessel which should have received the goods is

lost, and this fact being established beyond doubt, and the whole object of the voyage thereby defeated, she returns to the port from which she set out, would it lie in the charterer's mouth to say that she had not persevered in a useless voyage, and had thereby entirely forfeited her right to freight? Could he be heard to say so, if it were apparent that, by proceeding on his voyage. the master would have exposed the cargo to great risks of capture by pirates, or loss from other causes?

The case at bar seems in all respects analogous to the case last supposed. The delivery contemplated by the contract had become as impracticable as if the Spanish fleet had perished in a storm, or been sunk by the enemy. The delivery has thus been prevented by no fault or misfortune of the shipowner, but by the misfortune of the shipper, or by reason of events, the consequences of which should, in my opinion, be borne by him.

The case at bar thus falls within the principle of the cases above cited, and of the rule as laid down by the continental jurists. I am therefore of opinion that the ship is entitled to the freight stipulated in the charter party.

Her claim to return freight remains to be considered. The opinion of Boulay Paty that freight is earned for the return as well as the outward voyage, where a sale of the merchandise is impracticable or its landing is prohibited, has already been referred to. This rule is evidently just, where the freight originally stipulated for is a compensation for the outward voyage only. But where it appears from the nature of the voyage and the surrounding circumstances that no return cargo could have been expected to be obtained by the ship, and that the freight stipulated for was received as a compensation for the voyage out as well as for the return voyage empty, it would seem unjust to allow any additional sum for bringing the cargo back, especially where, as in this case, the possibility of such a necessity

must have been known to the carrier. In any event, the allowance would be in the nature of a *quantum meruit* for the service.

In the case at bar, it is not suggested that if the ship had delivered her cargo to the fleet off Valparaiso she would have sought or could have obtained any return cargo. I think it may fairly be inferred from the nature of the voyage that no employment of that kind was expected by the shipowner, and that the sum charged, fifteen dollars per ton, was accepted as a compensation for the outward voyage and the return empty. No evidence whatever is offered as to the rate of freight on a voyage from the Chincha Islands to this port. It is not even shown that any freight could have been procured by the vessel if she had there found the Spanish fleet and delivered her cargo. The nature of the enterprise in which she was engaged renders it extremely improbable that any effort to obtain a return cargo would have been made. The event which has prevented the ship from delivering her cargo, and has deprived the shipper of all benefit from the voyage, ought not to put the shipowner in a better condition than he would have been in had he found the fleet and delivered his cargo. I think that for these reasons, and especially in the absence of all evidence by which to determine what freight for the return voyage should justly be allowed, that the sum stipulated in the charter party is all that the ship is entitled to. It appears that the coal was worth, at the time the ship arrived, about fifteen dollars per ton. The gross proceeds of seven hundred and eighty-six tons was $11,790. It was sold by the shipowner, and the duties, etc., paid by him. The duties, storage, cartage, etc., amounted to $1,794.72; net proceeds, $9,995.25. The balance of freight due was $5,895. Deducting this from $9,995.25, there remain $4,100.25.

The value of the coal was stated by the witnesses in gold coin. The amount due the libellants for the cargo sold by the

claimants, less the amount due the latter, will therefore be, in legal tender notes, $5,460, for which a decree must be entered.

OGDEN HOFFMAN,

Judge.